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Supreme Court, U.S.
FILED
FEB 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JORGE SALGADO,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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ATTORNEY FOR PETITIONER

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FIRST QUESTION PRESENTED

Whether the Circuit Court reversibly erred in failing to notice the numerous plain errors affecting substantial rights of Salgado although those errors were not brought to the attention of the courts below but were first raised at this Court in this petition for certiorari.

SECOND QUESTION PRESENTED

Whether Salgado was denied his constitutional right to effective assistance of counsel, when Salgado's previous attorneys failed to perform within the range of competence demanded in criminal cases and failed to assure Salgado an adequate opportunity to present his claims fairly in the context of not only the federal appellate process but also the pre-trial, trial and sentencing stages of this case.

THIRD QUESTION PRESENTED

Whether there was an illegal seizure of evidence after searches of Salgado's Apartment 211 which was located at 2580 Gulf Road, Glenview, Illinois, where:

1) prior to the officers' warrantless "cursory search" of apartment 211, there was absolutely no probable cause to believe cocaine was in apartment 211 since Bernal told the officers he had gotten the cocaine elsewhere;

2) contrary to the circuit court's factual finding, the record evidence clearly shows that the issuing magistrate was unaware officer Lett's search warrant affidavit was partially based on information obtained by the officers during their initial warrantless "cursory search" through apartment 211; and

3) officer Lett's affidavit was made with at least reckless disregard for the truth when Lett falsely stated that apartment 211 at 2580 Gulf Road was the apartment to which Bernal took Agent Dailey, and from which Bernal had obtained the cocaine.

FOURTH QUESTION PRESENTED

Whether the Circuit Court improperly affirmed Count 5's sentence, since that 20 years sentence and $500,000 fine exceeded the statutory maximum punishment prescribed by 21 U.S.C. 843(c).

FIFTH QUESTION PRESENTED

Whether the Circuit Court improperly affirmed the convictions and the unenhanced sentences of a $500,000 fine and twenty years imprisonment, since those sentences exceeded the statutory maximum of fifteen years punishment prescribed in 21 U.S.C. 841(b)(1)(B) where on the trial court's instructions which authorized the jury to convict of only lesser included offenses, the jury only could have found that:

(a) as to counts 3 and 4, the government proved the following:

> "First, that the defendant possessed a quantity of a mixture containing cocaine; second, that the defendant did so knowingly, and, third, that at the time the defendant possessed the cocaine he intended to distribute it"

(A. 76 for Count 3; A. 77 for Count 4); and

(b) as to count 2, the government proved:

> "... the following propositions: First, that the defendant distributed a quantity of a mixture

containing cocaine and, second, that at the time the defendant distributed the cocaine he did so knowingly and intentionally" (A. 75); and

(c) as to count 1, the government proved:

"... following propositions: First, that a conspiracy existed to possess and distribute cocaine as described in Count 1, and, second, that the defendant, Jorge Salgado, knowingly and intentionally became a member of the conspiracy" (A. 73); although

(d) the purities and weights of the government's cocaine exhibits are as follows:

Exhibits	Grams: net/gross	%
No. C-1	28.1 / 50.6	93
No. C-2	971 / 1350	93
No. C-3	913 / 1253	96
No. C-4	40 / 349	92
No. C-5-A	12,067 / 16,800	93

and (e) those exhibits allegedly involved: Exhibit C-1 is Counts 2's sample; Exhibit C-2 is Count 3's remainder of a kilo; and Exhibits C-3, C-4 and C-5-A applied to Count 4's stash at apartment 211.

SIXTH QUESTION PRESENTED

Whether the Circuit Court improperly affirmed the sentences on both Counts 2 and 3 (cocaine distribution and possession with intent to make the resulting sale) where:

1) in its enactment, Congress intended to punish only once when the evidence shows successive criminal stages, all directed toward consummation of the single criminal undertaking in violation of 21 U.S.C. 841(a)(1); and

2) Salgado's initial distribution of one ounce to undercover officer Lett, and Salgado's possession of the remainder of a kilo for prompt sale to Lett occurred at the same time, in the same place, and with the involvement of the same four participants; and

3) the Double Jeopardy clause restrains the trial court's power to impose those multiple sentences.

SEVENTH QUESTION PRESENTED

Whether the Circuit Court improperly affirmed the sentences on both Counts 4 and 3 (cocaine possession of 13,020 grams in Glenview at apartment 211 and of 971 grams in Chicago) where:

(1) Salgado's course of conduct—here, several separate but simultaneous acts of constructive possession of different parcels of cocaine, with intent to distribute—only can result in a single violation of 21 U.S.C. 841 (a)(1); and

(2) there is no indication that Congress intended to permit a multiplication of a defendant's offense of possession at any given time upon evidence that he had continuous and uninterrupted constructive possession of different quantities of cocaine that had been separately packaged or stashed in different places at one or several locations; and

(3) counts 3 and 4 are multiplicitous, thereby precluding separate convictions and sentences; and

(4) the Double Jeopardy clause restrains the district court's power to impose those multiple sentences.

EIGHTH QUESTION PRESENTED

Whether the Circuit Court improperly affirmed the 20 years imprisonment enhanced sentences on Counts 1, 2, 3 and 4 since the trial court was without authority to enhance at the December 17, 1985 sentencing hearing where:

1) the government failed to prove beyond a reasonable doubt its factual enhancement allegations that:

> "Salgado was convicted for possession of controlled substances with intent to deliver in the case of People v. Jorge E. Salgado, No. 83-156 before Judge Bailey of the Criminal Courts of Cook County, Illinois on September 9, 1983"; and

2) the Double Jeopardy clause bars the government on remand from having another opportunity to prove to the sentencing factfinder beyond a reasonable doubt the additional fact that Salgado was so convicted before State Judge Bailey in Cook County, Illinois.

NINTH QUESTION PRESENTED

Whether the Circuit Court properly affirmed the trial court's oral imposition of a special parole term for life on December 17, 1985 and the trial court's written December 17, 1985 judgment to that effect and the trial court's December 20, 1985 written docket entry amending the judgment to include a special parole term for life on counts 2 and 3 where:

1) it is clear that no special parole term is authorized by the statute under which Salgado was convicted on Count 3; and

2) contrary to Fed.R.Crim.P. 32(a) and 43, that December 20, 1985 written amendment to the judgment's sentences on counts 2 and 3 was done without Salgado or his counsel being present.

TENTH QUESTION PRESENTED

Whether the trial court exceeded its authority in setting the special parole term at life because Congress could not have intended a conviction's special parole term to be disproportionate to the maximum punishment allowable for the underlying crime, where the applicable substantive statute prescribes imprisonment at not more than 20 years for possession, with intent to distribute, of more than a kilogram and not more than 15 years for such possession of less. 21 U.S.C. 841 (b)(1)(A)(ii) and (b)(1)(B).

ELEVENTH QUESTION PRESENTED

Whether this Court could properly apply the concurrent sentence doctrine to refuse review of Salgado's convictions under any of Counts 1 through 5 where:

1) Salgado was denied his constitutional right to effective assistance in the courts below; and

2) the Parole Commission will use each of the five convictions to set the amount of time of incarceration before Salgado's parole eligibility; and

3) the district court imposed special parole terms on counts 2 and 3; and

4) the dual sentences on either counts 2 and 3 or counts 3 and 4 should merge into one sentence; and

5) the cocaine in count 4 was illegally seized and should be suppressed; and

6) the 20 years sentences on counts 1, 2, 3, 4 and 5 are unlawful for each is greater

than the maximum punishment permitted under the unenhanced sentencing provisions of 21 U.S.C. 843(c) (count 5) and of 21 U.S.C. 841 (b)(1)(B) (Counts 4, 3, 2 and 1 where:

a) as to Counts 1, 2 and 3, less than one kilogram was proven to have been distributed, possessed with intent to distribute, and to have been conspired about; and

b) as to count 4, the jury was only instructed as to the critical elements of the offense under 21 U.S.C. 841(b)(1)(B) and the district court was prohibited from imposing more than an unenhanced 15 year sentence on Count 4 by its own failure to properly instruct the jury that to convict on Count 4, the government had to prove that the quantity of cocaine was greater than one kilogram.

LIST OF ALL PARTIES BELOW

The parties at the Seventh Circuit were: The United States of America and Jorge Salgado.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. Undersigned counsel is not presently aware of any other related case about to be presented to this Court. However, certain of Salgado's issues are already pending at but are unresolved by this Court. See Ray v. United States, ___ U.S. ___, 107 S.Ct. 454, 93 L.Ed.2d 400 (1986).

IDENTITY OF DEFENSE COUNSEL BELOW

Salgado was represented at trial and at the court of appeals by attorneys Dennis A. Berkson and Henry B. Samuels.

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TO THE UNITED STATES SUPREME COURT:

Petitioner Jorge Salgado respectfully prays that a writ of certiorari issue to review the December 5, 1986 judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The judgment of the district court is unreported. The opinion of the circuit court (Pet.App.A. 6-32)[1] was reported. United States v. Salgado, 807 F.2d 603 (7th Cir. (1986).

JURISDICTION

This appeal stems from conviction of crimes against the United States. The district court for the Northern District of

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[1] Citations to the Appendix to the petition for writ of certiorari will be to its pages as "Pet.App.A.___". Record citations will be to "1R.__" (pp. __ to ___) for the Clerk's Transcript and to the Reporter's Transcript as "2R.__" (pp. 1 to 260), "3R.__" (pp. 261 to 469), "4R.__" (pp. 2 to 19), and "5R.__" (pp. 1 to 40).

Illinois, Eastern Division had jurisdiction under 18 U.S.C. 3231. The circuit court had jurisdiction under 28 U.S.C. 1291. Its judgment and opinion were entered on December 5, 1986. (Pet.App.A. 4-32.) No motion for rehearing was filed. On January 30, 1987, this Court ordered that the time for filing this petition was extended to March 5, 1987. (Pet.App.A. 3.) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The numerous applicable statutes, regulations and rules are printed in the appendix attached to the conclusion of this petition. (App.Attach.Pet. 66 to 84.) They are: Fourth and Fifth Amendments, U. S. Constitution; 18 U.S.C. 2, 3231, 4205, 4206 and 4207; 21 U.S.C. 812, 841, 843, 846 and 851; 28 U.S.C. 1254(1), 1291 and 2111; and Fed.R.Cr.Proc. 32(a)(1), 43(a) and 52.

STATEMENT OF THE CASE

On June 28, 1985, Jorge Salgado and co-defendant Hernando Bernal were charged in cause no. 85 CR 357 by indictment with four violations of the narcotics laws of the United States. Salgado was also charged with a fifth violation of those narcotics laws. (Pet.App.A. 63-69.) The district court had jurisdiction under 18 U.S.C. 3231. Count One of the indictment alleged that from at least May 24, 1985, to on or about May 31, 1985, each defendant wilfully and knowingly did conspire together and with unknown persons in violation of 21 U.S.C. 846 to commit the following crimes against the United States:

> (a) to knowingly and intentionally distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); (b) to knowingly and intentionally possess with intent to distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); and (c) to knowingly and intentionally use a

communication facility in committing the crime of distribution of a controlled substance, in violation of Title 21, United States Code, Section 843(b).

Eight overt acts were alleged. Count Two alleged each defendant knowingly and intentionally distributed 50.6 grams of a mixture containing cocaine on or about May 31, 1985, in violation of 21 U.S.C. 841(a)(1). Count Three alleged each defendant knowingly and intentionally possessed, with intent to distribute, 1,348 grams of a mixture containing cocaine on or about May 31, 1985, in violation of 21 U.S.C. 841(a)(1). Count Four alleged each defendant knowingly and intentionally possessed, with intent to distribute, 18,390 grams of a mixture containing cocaine on or about May 31, 1985, in violation of 21 U.S.C. 841(a)(1). Count Five alleged that on or about May 31, 1985, Jorge Salgado knowingly and intentionally used a communication facility, a mobile telephone,

in committing the conspiracy to possess with intent to distribute cocaine, a felony under 21 U.S.C. 846, as more fully described in Count One of that indictment, in violation of 21 U.S.C. 843(b).

On August 7, 1985, Salgado's defense counsel filed several pre-trial motions, including a Motion to Suppress Evidence. (Pet.App.A. 58-62.) Without a hearing, that suppression motion was denied by written memorandum opinion and order on September 5, 1985. (1R. 39.) Salgado was not tried with co-defendant Bernal. (1R. 43.) The evidentiary portion of Salgado's jury trial commenced before District Judge John A. Nordberg on October 17, 1985. (2R. 83.) The jury returned a verdict of guilty on all five counts on October 22, 1985. (1R. 51.)

At the December 17, 1985 sentencing hearing (5R. 1 to 40), the district court imposed sentences on Salgado of twenty (20)

years imprisonment on each count to run concurrently and a $500,000 fine. (1R. 63.) The district court also orally imposed a special parole term of life. (5R. 38; Pet.App.A. 35.) Only one special parole term is contained in the written judgment of the district court. (1R. 63; Pet.App.A. 33-34.) On December 20, 1985, the district court had a docket entry made that read: "(1) Judgment is entered as follows: Judgment and commitment order of December 17, 1985 is corrected to read 'IT IS FURTHER ORDERED that the defendant shall serve a special parole term for life under counts 2 and 3.'" (1R. 64; Pet.App.A. 36.) A timely notice of appeal was filed on December 23, 1985. (1R. 65.) The circuit court entered its judgment of affirmance on December 5, 1986. (Pet.App.A. 4-5.)

STATEMENT OF FACTS

On May 30, 1985, a confidential informant named "Alan" told special agents of the Drug

Enforcement Administration (DEA) Task Force that Jorge Salgado had cocaine to sell. That task force included federal agents and officers from the Chicago Police Department. Alan was introduced to Chicago Police Sergeant Augustus W. Lett. Arrangements were made to have Officer Lett purchase cocaine from Salgado. (2R. 84-86, 117.)

On May 31, 1985, at approximately 2:00 p.m., Alan and Officer Lett went to Alan's residence at 5521 W. Warwick in Chicago. (2R. 86, 167-168.) Lett carried $6,000 in prerecorded funds to purchase a sample of cocaine. (2R. 86-87.) Officer Clarence Travis accompanied Officer Lett and Alan in a separate vehicle. Travis waited near the residence. Travis was to act as Lett's money-man. Travis carried a $46,000 flash roll. (2R. 87, 91, 168.) Approximately seven other Task Force agents took up surveillance positions near the residence. (2R. 167.)

Later that afternoon, Salgado arrived at Alan's residence, got out of his car, and carried two black bags inside. One of the bags was a brief case telephone. (2R. 90, 168-169, 176-177.) Officer Lett was introduced to Salgado. Lett asked about the telephone. Salgado replied, "I'm like you, I don't carry that shit. I got a guy carrying it for me. He is circling the neighborhood, and if everything's okay he is going to bring the stuff in." (2R. 90-91.)

Salgado's portable phone rang. Salgado answered. He listened and said, "Okay." Salgado asked Lett to show him the money. (2R. 91.) Salgado and Lett left the residence through the back door and walked one block to where Officer Travis was parked. At approximately the same time, Salgado's co-defendant Hernando Bernal entered Alan's residence from the front carrying a reddish-orange bag. (2R. 91, 168-169, 172-173.)

Officer Lett introduced Salgado to Officer Travis. Travis showed the flash roll. Salgado counted the money and said to Lett, "Okay. Have your guy park in front of the house and you come in and check the stuff. If the stuff is alright, you take the stuff and I will come out and get the money from your guy." Salgado and Lett went back to Alan's residence. Officer Travis parked as arranged. (2R. 91-92.)

At the residence, Officer Lett met Bernal. An oblong box rested on top of the reddish-orange bag Bernal carried into the residence. Salgado asked Alan to give him a knife and he opened the box. Salgado slit a foil wrapping and exposed a large plastic bag containing a compressed brick of white powder. Salgado said, "This is the finest you can get. You can test it anyway you want." (2R. 93.) Lett told Salgado that he only wanted a three ounce sample to run a test. Salgado said he

did not sell ounces and one ounce would do. Lett agreed to buy an ounce. Salgado weighed an ounce of the powder. Salgado put it in a plastic bag, saying: "You now owe me $1500." (2R. 94.) Lett gave Salgado $1,500 and said: "Okay. If this tests okay I'll see you in two hours. Give me a phone number." Salgado pointed to Alan, saying: "He will reach me." Salgado's portable phone rang, and he spoke to the caller in Spanish. When Salgado finished the conversation, he told Officer Lett: "You see, I am a busy man. That was an order for five kilos." Salgado told Bernal to take the oblong box and meet him with the five kilos. Officer Lett then shook hands with Salgado and left the residence through the rear door. Officer Lett, by radio, told the surveillance agents that he had given Salgado $1500 in government funds and Bernal would be leaving shortly with the remainder of the kilo. Lett went straight to the DEA office and conducted

a chemical field test on the ounce he had received from Salgado and it tested positive for cocaine. (2R. 95-98.)

Bernal and Salgado separately left Alan's residence about four minutes apart, at approximately 3:00 p.m. (2R. 174, 185.) Government agents followed Bernal after he left Alan's residence. Bernal was soon arrested. His automobile was searched. The agents seized the reddish-orange bag and oblong box containing the white powder. Bernal was questioned about the source of the powder and he took the agents to 2600 West Golf Road in Glenview. (2R. 211-213.)

DEA agents followed Salgado for 30 minutes. He was arrested near the 3300 block of West Lawrence Avenue in Chicago. Salgado was searched incident to his arrest. A total of approximately $3,800 was recovered from Salgado. $1,300 of that was prerecorded funds given Salgado by Lett. The rest were

unrelated funds. (2R. 185 to 189.) The officers also recovered from Salgado several keys, a key ring (2R. 187), his portable telephone (2R. 195, 201), and a receipt from A-Alert Lock & Alarm Company. (2R. 196.) That receipt showed that for customer "Salgado," A-Alert had re-keyed the door lock at 2580 Golf Road in Glenview, Illinois on May 28, 1985. A key recovered from Salgado was one of three A-Alert made for the re-keyed lock. (3R. 290-292.) Carrying Salgado's keys, Agent Nyman arrived at the Glenview apartment complex. Using those keys, Agent Bridges determined that they fit apartment 211. Bernal did not take the agents to 211. "He [Bernal] took us to a different building; he took us to 2600; I believe that the address of apartment 211 was 2580." (2R. 214-215.)

VPX Corporation operates apartment buildings at both 2580 and 2600 West Golf Road in Glenview. The distance between the

buildings is approximately 100 yards. (3R. 267, 272.) In addition to common management, each building is maintained by a common janitorial staff. (3R. 280-281, 285.)

After Agent Bridges learned that Salgado had been arrested, Agent Nyman arrived with the seized keys. Then the agents talked to the janitor and determined that Salgado had just recently moved from 2600 Golf Road to apartment 211 at 2580 Golf Road. (2R. 214-215.) At approximately 4:00 p.m., Agent Bridges took the keys from Agent Nyman and unlocked the door to apartment 211. Bridges walked into the apartment with Agents Nyman, Dailey and Riordan. Each room of the apartment was cursorily searched. (2R. 237-239, 245.) Officer Bridges found neither furniture nor a telephone nor anyone in the apartment. (2R. 230, 243-244.) While in that apartment, Bridges saw a white, plastic box in the kitchen (2R. 219, 238, 240), a suitcase

and triple-beam balance scale on the bedroom floor and a money counting machine in the living room. (2R. 226, 229, 238-239.) The agents did not touch any of the items they saw. (2R. 245-246.) After that warrantless search, the agents secured the apartment while a search warrant was obtained. (2R. 246.)

Armed with a search warrant hours later, government agents made a warrant search of Salgado's apartment 211 at approximately 8:30 p.m. on May 31, 1985. The agents photographed the kitchen, living room and bathroom. (2R. 216-218, 239.) They seized a brown cardboard box containing twelve white plastic boxes identical to the one taken from the kitchen counter and the one taken from Bernal. Each measured one and one-half inches high, six inches wide, and eighteen inches long. (2R. 219-223.) They seized from the kitchen counter a white, plastic box containing white powder; a white, plastic box containing white

powder from the kitchen cabinets; a brown cardboard box containing 12 white, plastic boxes each containing white powder from the bathroom linen closet; an automatic money counting machine from the living room floor; a blue suitcase containing brown paper bags, several boxes of plastic bags and a roll of individual sealable or zip-lock type plastic bags, miscellaneous papers and paper clips; a green writing pad with columns of dollar figures in a debit and credit format; and an Ohaus triple-beam balance scale from the bedroom. (2R. 219 to 229.) The white powder Salgado sold Officer Lett weighed 28.1 grams, of which 93 percent was cocaine. The powder seized from Bernal weighed 971 grams, of which 93 percent was cocaine. The net weight of the powder seized from Apartment 211 was (1) 913 grams, of which 96 percent was cocaine; (2) 12,067 grams, of which 93 percent was cocaine; and (3) 40 grams, of which 92 percent was

cocaine. Altogether apartment 211's cocaine had a net weight of approximately 13,360 grams and an average purity of 93 percent. (2R. 255-257.)

On June 11, 1985, officers conducted a second warrant search of apartment 211. Officer Keating found ridge impressions on two pieces of glass and on a bathroom faucet. (3R. 296-297.) Fingerprint expert DuShane identified Salgado's fingerprints on a gray glass on the kitchen counter and a rectangular piece of glass in the living room. (3R. 306.)

ARGUMENTS FOR GRANTING WRIT

The Solicitor General's Expected Position

While Salgado is seeking this Court's independent examination of the merits of these questions presented, Salgado expects that, if invited, the Solicitor General's position herein will in part be similar to Salgado's. Salgado's counsel is aware of Grabina v. United States, 369 U.S. 426, 82 S.Ct. 880, 8

L.Ed.2d 7 (1962). After the district court's resentencing, Grabina again appealed. The circuit court said:

> This defect was not presented on Grabina's appeal from conviction, which this court affirmed. It was raised, however, by a motion for rehearing presented by Grabina, acting pro se on November 15, 1961. The motion was denied without opinion. He then sought and obtained a writ of certiorari. On April 16, 1962, the Supreme Court vacated the judgment and remanded the case to the District Court for resentencing. Grabina v. United States, 369 U.S. 426, 82 S.Ct. 880, 8 L.Ed.2d 7.

United States v. Grabina, 309 F.2d 783, 785 (2nd Cir. 1962).

Consistent with the executive confession of error at this Court in Grabina, Salgado should suffer neither from the circuit court's failure to see "plain error" nor from Salgado's prior attorneys' prejudicial failure to present these numerous errors to the trial and circuit courts. These errors were recognized first by undersigned counsel.

REASONS FOR REVIEWING FIRST QUESTION

In this case, the Seventh Circuit Court affirmed without noticing the numerous "plain errors" first pointed out in this petition. On its own motion, this Court may notice those plain errors. Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945).

Salgado submits that the circuit court reversibly erred in failing to sua sponte notice the questions presented in this petition. Salgado respectfully suggests that the appropriate remedy is for this Court to (a) grant this petition for writ of certiorari and (b) decide the merits of this case. The Bench and Bar need immediate instruction on how to properly try the sophisticated trials where the sentence may be enhanced not only by the large quantities of drugs involved but also by prior convictions for similar controlled substances crimes.

REASONS FOR REVIEWING SECOND QUESTION

In this case, the Seventh Circuit Court's affirmance of the trial court's judgment, directly conflicts with Salgado's constitutional right to effective assistance of trial and appellate counsel. Because Salgado's prior counsels' unprofessional errors so upset the adversarial balance between defense and prosecution, the trial and appellate proceedings were rendered unfair and both judgments below rendered suspect. See Kimmelman v. Morrison, ___ U.S. ___, 106 S.Ct. 2574, 2583, 90 L.Ed.2d ___ (1986).

The Bench and Bar know that the experienced better advocates winnow out weaker arguments on appeal, focus on the central issues, and "go for the jugular." In criminal cases, the effective defense attorney is required to do that in both the trial and appellate courts. See Id; and Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d

821 (1985); United States v. Birtle, 792 F.2d 846 (9th Cir. 1986). See also Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Salgado submits that in the trial and appellate courts his attorneys were so "prejudicially ineffective" that there is a reasonable probability that, but for those deficient performances, the result of the proceedings below would have been different. Without confidence in the outcome below, the remainder of this petition is devoted to pointing out the plain and reversible errors made by the courts below. Of those, only the Fourth Amendment issue was partially litigated by former defense counsels. On that issue, those counsels' performances were less than competent. The remaining issues here went unlitigated by prior defense counsels. As to each instance of incompetency, Salgado incorporates here for brevity's sake, all the

reasons for review of the other questions presented in this petition.

REASONS FOR REVIEWING THIRD QUESTION

In this case, the Seventh Circuit Court's refusal to suppress the apartment 211 evidence, which is the basis for count 4's conviction, is in conflict with the principles of Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); and Franks v. Delaware, 438 U.S. 154, 156-157, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978), and is in direct conflict with United States v. Griffin, 502 F.2d 959 (6th Cir. 1974), cert. denied, 419 U.S. 1050, 95 S.Ct. 626, 42 L.Ed.2d 645 (1974); and United States v. Segura, 663 F.2d 411 (2nd Cir. 1981), affirmed on other grounds, ___ U.S. ___, 104 S.Ct. 3380, ___ L.Ed.2d ___ (1984).

In overruling Salgado's illegal search and seizure issue, the circuit court placed itself in direct conflict with the

constitutional provision of the Fourth Amendment that the right of the people to be secure in their houses shall not be violated. In this case, the police entered Salgado's apartment 211 without a warrant, without consent, and without exigent circumstances. Then a few hours later, they reentered with a search warrant. That warrant had been obtained based on an affidavit that contained some false statements attributed to officer Dailey. He had made the initial entry of apartment 211. During Dailey's warrantless search, much of the "convicting" evidence was seen in apartment 211. (2R. 237 to 239.) It was seized during the first and second warrant searches of apartment 211 at 2580 Golf Road, Glenview, Illinois. (2R. 215-220; 3R. 294-298.) Salgado's written motion to suppress in effect asserted as facts that (Pet.App.A. 58-62):

On May 31, 1985, Salgado was arrested by DEA agents in the vicinity of 5521 W. Warwick, Chicago, Illinois. Subsequently DEA agents entered and searched apartment 211 located at 2580 W. Golf Road in Glenview, Illinois. Salgado was the alleged lessee of that apartment. No one with valid authority gave valid consent to that search. The search was not made incident to the arrest. The search was not made pursuant to a lawful search warrant. It was made without probable cause and without exigent circumstances. The subsequent warrant search on June 11, 1985 for fingerprints constituted "fruit of the poisonous tree." The agents who obtained and executed the search warrant blatantly failed and neglected to exercise good faith in the procurement and execution of the warrant. The affidavit upon which the warrant was obtained failed to show probable cause that the premises to be searched contained contraband.

In its answer, the government in effect responded (Pet.App.A. 53-57):

> The apartment was never searched without a search warrant. Salgado had the burden of proving the illegality of a search conducted pursuant to a warrant; but Salgado had failed to meet that burden. The trial court's review of the search warrant affidavit would show that there was substantial basis for the magistrate to conclude that the search would uncover evidence of wrong doing. Thus Salgado's motion to suppress should be denied without a hearing.

Without a hearing, the trial court denied Salgado's motion to suppress. (Pet.App.A. 38.)

In the search warrant affidavit (Pet.App.A. 41-47), Lett swore that apartment 211 concealed the following property: "Cocaine, United States currency, books, papers, documents, weighing scales, and other packaging material." Lett's sworn basis of knowledge was that (Pet.App.A. 45-47):

> 10. After the arrest of the Latin male [Bernal], he ... made the following statement to Task Force Agent Maurice Dailey: a. This was the second time that he had done this for Salgado. b. Salgado had just told him to take the kilogram to a particular apartment in Glenview, Ill. This was the apartment where the Latin male had obtained the kilogram of cocaine. Salgado said to go to that apartment and get five more kilograms and then meet with Salgado.
>
> 11. Agent Daley (sic) told me as follows: a. the latin male agreed to take agent Daley (sic) to the Glenview apartment, which he did. The latin male indicated the apartment building, which was 2580 Gulf Road, Glenview, Illinois. b. Agent Daley (sic) checked with the building manager at the address who said that Mr. Salgado lived in apartment 211. c. Agent Daley (sic) went to apartment

> 211, knocked on the door, and received no response. Agent Daley (sic) was able to insert in the door a key that was seized from Salgado when he was arrested. d. Agent Daley (sic) and other Task Force Agents are now securing the apartment from the hallway outside of it.

Thus, the issuing magistrate knew that Bernal did not tell Lett or anyone else about apartment 211 containing any U.S. currency, books, papers, documents, weighing scales, and other packaging materials.

Salgado submits that during trial it became evident that "the list of specific items sought in 211" was obtained during the officers' initial illegal warrantless entry into apartment 211. For obvious reasons, Task Force Agent Maurice Dailey did not testify at trial. Task Force Agent Thomas Bridges did testify at trial. (2R. 210 to 249.) Bridges testified that after arresting Bernal, he had occasion to question Bernal. Contrary to the sworn facts in Lett's affidavit for search warrant, Bernal never took Bridges to that

specific "Apartment 211." Bridges testified that Bernal was questioned as to the source for his white box of powder. After that, Bernal took Bridges to a high-rise apartment building at "2600 West Golf in Glenview." (2R. 213.) At "2600," Salgado's name was on the doorbell. (2R. 215.) It was on the seventh floor. Its number, Bridges did not recall. (2R. 233-234.) Salgado's address was apartment 709 at 2600 Golf Road, VPX Corporation employee Yacktman later testified. (3R. 270.)

Again contrary to what Lett's affidavit stated, Bridges testified he determined from the janitor [not affiant's building manager] that Salgado had moved to apartment 211 at 2580 "a few days before." (2R. 215.) Moreover, contrary to the factual findings of the circuit court, Bridges testified that he himself had "other agents secure a search warrant for that apartment [211]." (2R. 215,

216.) Again contrary to Lett's affidavit and the factual findings of the circuit court, Bridges testified that when he arrived at apartment 211, he walked into the room without a search warrant and at around 4:00 p.m., made a cursory premises search along with Agents Nyman, Riordan, and Dailey [who provided the information to Lett]. (2R. 237 to 239.) While conducting the warrantless search, the officers observed in plain view the following items: a piece of gray glass (2R. 218, 219); a white plastic box containing white powder (2R. 219, 238, 239); 12 plastic white boxes (2R. 223); a money counting machine (2R. 239); a blue suitcase (2R. 236, 239); and an Ohaus triple beam scale. (2R. 229.) These were essentially the same items Lett swore in his affidavit were in apartment 211 of 2580 Gulf Road. Those items were recovered by the officers while executing the search warrant

which was obtained at approximately 8:30 or 9:00 p.m. (Pet.App.A. 48-49.)

At trial, Salgado orally renewed his motion to suppress during Bridge's testimony. Relying on Segura v. United States, ___ U.S. ___, 104 S.Ct. 3380, ___ L.Ed.2d ___ (1984) [a 5-4 decision], Salgado's attorney argued that the government's answer wrongfully alleged that the officers had not initially entered the premises. The government responded that Segura stood for the proposition that police can go through an apartment and secure the premises so long as any information obtained while inside the apartment is not used in the search warrant affidavit. That is the case here, the prosecutor claimed, asserting: "They didn't use any of that information." The trial court again denied the suppression motion. (2R. 241-243.)

On appeal, the circuit court did not decide the legality of the initial entry made

without a warrant, without consent, and without exigent circumstances. Nevertheless, the Salgado circuit court upheld the warrant searches, theorizing (Pet.App.A. 32):

> We need not weigh these arguments in this case. We hold that the items seen by officer Bridges were lawfully seized later pursuant to a valid warrant, even if the initial search was (though we do not decide whether it was) unlawful.

Salgado submits that in this case, the police illegally entered apartment 211. United States v. Segura, 663 F.2d 411 (2nd Cir. 1981), affirmed on other grounds, ___ U.S. ___, 104 S.Ct. 3380, ___ L.Ed.2d ___ (1984). Their initial warrantless entry was illegal under the Fourth Amendment because it occurred in the absence of consent, exigent circumstances, or a valid warrant. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 474-78, 91 S.Ct. 2022, 2042-44, 29 L.Ed.2d 564 (1971).

Salgado also submits there was absolutely no valid probable cause to search apartment 211, and all evidence secured during the warrant searches was illegally seized and suppressible. The warrant and its supporting affidavit were related to the illegal initial entry. There was no independent source of knowledge that apartment 211 contained either cocaine or the affidavit's other "listed items" of evidence. Prior to their "cursory" entry, the police only knew Salgado was dealing in cocaine and that Bernal's cocaine had come from 2600 Golf Road, Glenview, Illinois. (2R. 213.) As to the 2580 Golf Road complex's apartment 211, the janitor told the police Salgado had moved there "a few days before."

Why did the Salgado circuit court ignore Payton v. New York, 445 U.S. 573, 591, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980) (an illegal arrest case)? There this Court said:

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a fine line at the entrance to the house. Absent exigent circumstances, that threshold may not be reasonably crossed without a warrant.

Although Salgado's case concerns the illegal entry into a home, the circuit court below used many ifs, buts and maybes to end up not deciding whether the officers' illegal entry into Salgado's apartment violated the Fourth Amendment. (Pet.App.A. 32.)

During trial in this case, a showing was first made that certain information in Lett's affidavit was false and was obtained in an illegal manner. The question now becomes how has the legal status of the search warrant been affected.

Some courts have answered by saying that the warrant is nonetheless valid <u>if it could have issued upon untainted information in the affidavit</u>. See <u>United States v. Veillette</u>, 778 F.2d 899, 903-904 (1st Cir. 1985)

[reasoning that this squares with Franks v. Delaware, 438 U.S. 154, 171-172, 98 S.Ct. 2674, 2684-2685, 57 L.Ed.2d 667 (1978) and Nix v. Williams, 467 U.S. ___, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) so that the police should not be put in a worse position than they would have been in had they not violated the law], cert denied, ___ U.S. ___, 106 S.Ct. 1970, ___ L.Ed.2d ___ (1986). The Salgado circuit court in part used the same reasoning, but failed to suppress the cocaine seized in apartment 211 by refusing to rule on the unlawfulness of the initial warrantless entry.

Other courts of appeals have disagreed.[2] Contrary to the circuit court's Salgado

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[2] See United States v. Griffin, 502 F.2d 959, 960-961 (6th Cir. 1974), cert. denied, 419 U.S. 1050, 95 S.Ct. 626, 42 L.Ed.2d 645 (1974). And then some courts suppress parts of the evidence and not other parts. See United States v. Segura, 663 F.2d 411 (2nd Cir. 1981), affirmed on other grounds, ___ U.S. ___, 104 S.Ct. 3380, ___ L.Ed.2d ___ (1984).

opinion, the "savior of some evidence" reasoning from Franks and Nix does not apply to this case.

The Lett affidavit's false information about apartment 211 was furnished to Lett by Officer Dailey, after Dailey made the initial illegal warrantless entry.

It is not Salgado's fault that the government's prosecutor first denied that the officers had illegally entered Salgado's apartment. When at trial that was found to be false, the prosecutor changed tactics. He incorrectly argued that the police had not used any of the illegal information to obtain the search warrant. But for the prosecutor's misrepresentations, Salgado could have obtained a hearing to demonstrate Lett's affidavit for search warrant contains many false statements that can only have been made knowingly and intentionally, with reckless disregard for the truth. Franks v. Delaware,

438 U.S. 154, 156-157, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978). Even if Lett did not "really know" his "affidavit's hearsay from the other officer" had been illegally obtained, the apartment 211 evidence should have been excluded since the "objective reasonableness" standard applies to the collective team of all officers involved. United States v. Leon, 468 U.S. ___, 104 S.Ct. 3405, 3421 n. 24, 82 L.Ed.2d 677 (1984); United States v. Rule, 594 F.Supp. 1223, 1238-1239 (D. Ma. 1984), vacated as to Streifel and Quinn, 781 F.2d 953 (1st Cir. 1986).

Omissions in warrant affidavits are essentially the same as misrepresentations. Id, 594 F.Supp at 1239-1240; United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980). If a magistrate is to test probable cause by the "totality of circumstances" test of Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76

L.Ed.2d 527 (1983), then Lett's affidavit is rendered void and illegal, since it omits these material facts: the initial entry was illegal; Bernal took the officers to another building; and Bernal did not take the officers to apartment 211. Thus with those purposeful omissions and misstatements by the team of officers, the issuing magistrate was unlawfully deprived of his opportunity to perform his constitutional function. See United States v. Rule, 594 F.Supp. 1223, 1239-1240 (D. Ma. 1984). Those omissions rendered void the magistrate's search warrant, for if those omitted facts had been alleged in the affidavit, the magistrate would not have had probable cause to issue the warrant on apartment 211.

In this case, Salgado was not arrested anywhere near apartment 211. Thus arresting and searching officers were not legally entitled to conduct the cursory examination of

apartment 211 to see if anyone was present who might threaten their safety or destroy evidence. Such "cursory exams" have only been approved when both the accused is arrested at the very house cursorily searched, and the officer reasonably believes there might be someone else on the premises who poses a danger to evidence or the officer.[3] Before the warrantless cursory search of apartment 211, the agents only knew Salgado had rented it a few days before. At the exam time, they had no specific articulative reason to believe armed third persons might be on the premises to destroy evidence. This Court should hold: "Mere suspicions ain't enough, even if the

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[3] See United States v. Jackson, 778 F.2d 933, 936-937 (2nd Cir. 1985), cert. denied, ___ U.S. ___, 107 S.Ct. 308, ___ L.Ed.2d ___ (1986); United States v. Hatcher, 680 F.2d 438, 442-445 (6th Cir. 1982); United States v. Kolodziej, 706 F.2d 590, 596-597 (5th Cir. 1983); United States v. Gardner, 627 F.2d 906, 909-910 (9th Cir. 1980) and cases there cited.

suspicious officers are real experienced doing drug deals. The apartment 211 evidence should have been suppressed since those agents had absolutely no knowledge that apartment 211 probably contained evidence of a crime."

REASONS FOR REVIEWING FOURTH QUESTION

In this case, the Seventh Circuit Court's affirmance of Salgado's count 5 sentence of 20 years imprisonment and a $500,000 fine conflicts directly with the applicable sentencing statute, 21 U.S.C. 843(c), and with United States v. Fontanez, 628 F.2d 687 (1st Cir. 1980). In Fontanez, the defendant was convicted for violating 21 U.S.C. 843(b) by using a communication facility. The circuit court affirmed that conviction, but vacated the sentence and remanded for resentencing, since the sentence "exceeds the statutory limit. 21 U.S.C. § 843(c) provides for a sentence of 'not more than 4 years, a fine of not more than $30,000, or both.'" Id., at

691. Salgado prays that the sentence on count 5 should be vacated and the cause remanded for resentencing.

REASONS FOR REVIEWING FIFTH QUESTION

In this case, the Seventh Circuit Court's affirmance of Salgado's sentences on counts 1, 2, 3 and 4 conflicts in principle both with the due process clause of the Fifth Amendment as previously construed by this Court and with United States v. Davis, 656 F.2d 153, 160 (11th Cir. 1981), cert. denied, 456 U.S. 930, 102 S.Ct. 1979, 72 L.Ed.2d 446 (1982); United States v. Simmons, 725 F.2d 641, 643-644 (11th Cir. 1984), cert. denied, 469 U.S. 827, 105 S.Ct. 108, ___ L.Ed.2d ___ (1984); and United States v. Alvarez, 735 F.2d 461, 468 (11th Cir. 1984). Davis indicates that a district court exceeds the punishment allowed by 21 U.S.C. 841 in sentencing a first offender to six years incarceration for possession of marihuana. Alvarez and Simmons indicate that

since the quantity of the controlled substance constitutes a critical element of certain enhanced offenses under 21 U.S.C. 841, the district court is prohibited from sentencing the defendant to more than five years imprisonment if the government fails to allege "the crook" had over 1000 pounds of marihuana.

This Court discussed an analogous "plain error" in a district court's charge to the jury in Screws v. United States, 325 U.S. 91, 106-107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945).

The Due Process clause requires that in determining an evidentiary sufficiency issue, the reviewing court must also look to the trial court's instructions to the jury. See Jackson v. Virginia, 443 U.S. 307, 317-319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560 (1979); Benson v. State, 661 S.W.2d 708, 713 (Tex.Cr.App. 1983) (On Second Rehearing) cert. denied, 467 U.S. 1219, 104 S.Ct. 2667,

81 L.Ed.2d 372 (1984); Ortega v. State, 668 S.W.2d 701 (Tex.Cr.App. 1983) (Opinion On Original Submission). The purpose of those instructions is to inform the jury of the law applicable to the case. The jury evaluates the evidence and applies it to the law and definitions given in the trial court's jury instructions. A jury determines guilt or innocence based upon those jury instructions. In fact, Salgado's jury was instructed: "You must not question any rule of law stated by me in these instructions." (1R. 53; 3R. 435.) Salgado was found guilty by the jury, based upon the evidence adduced as viewed in light of the district court's instructions to the jury. While the indictment was directed to Salgado for notice and jurisdiction requirements, it was the jury instructions that "convict." Before the jury could fairly convict Salgado, the jury had to be instructed on the elements that constitute each of the

indictment's alleged five offenses. In the applicable portions of its jury instructions on counts 2, 3 and 4, the district court only permitted the jury to convict Salgado of "illegal involvement with unspecified quantities of a mixture containing cocaine." (3R. 440-443; Pet.App.A. 73-76.) Those instructions might sustain three substantive convictions. However, they are insufficient to support a $500,000 fine and 20 year sentences on counts 2, 3 and 4 under the quantity enhancement provisions of 21 U.S.C. 841(b).

On count 1's conviction for conspiracy, the single agreement to commit different drug offenses is a single criminal offense. That conspiracy is the crime and, however diverse its objects, it violates but a single statute. "For such a violation only the single penalty prescribed by the statute can be imposed." Braverman v. United States, 317 U.S. 49, 54,

63 S.Ct. 99, 102, 87 L.Ed. 23 (1942). As limited by the jury instructions, the count 1 conspiracy [to distribute one ounce] could be punished by imprisonment at no more than 15 years. (R. 440-441; Pet.App.A. 72-73.) By sentencing at 20 years, the district court erred.

In affirming Salgado's illegal sentences on counts 1, 2, 3 and 4, the circuit court erred. It should have noticed those errors on its own motion for:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936). Salgado requests that this Court find the trial court erred in imposing these unenhanced sentences above the statutory maximum.

REASONS FOR REVIEWING SIXTH QUESTION

In this case, the Seventh Circuit Court's affirmance of Salgado's sentences on counts 2 and 3 conflicts in principle with United States v. Palafox, 764 F.2d 558 (9th Cir. 1985)(en banc). In Palafox, the defendant was convicted of one count of distribution of heroin (a sample) and possession with intent to distribute heroin (the balance to be sold), both in violation of 21 U.S.C. 841(a)(1). Palafox met an undercover agent in a parking lot intending to sell him a package of heroin. The agent took a .12 gram sample of the drug from the package and returned the package to Palafox. Almost immediately thereafter, the agent arrested Palafox. He was charged and convicted both of the delivery of the sample and of possession with intent to distribute the rest of the heroin in the package. In its en banc decision, the circuit court held that

"where the defendant distributes a sample and retains the remainder for the purpose of making an immediate distribution to the same recipient at the same place and at the same time, verdicts of guilty may be returned on both counts but the defendant may be punished on only one." Id. at 560. Although the Palafox court recognized Congress' interest in criminalizing all aspects of drug trafficking, the court found no congressional intent to punish a defendant more than once for a single transaction. Id. at 560-62.

Palafox followed the approach taken in Prince v. United States, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957). Prince held that although Congress had criminalized both the entering of a bank with intent to rob it and the robbery itself, it did not intend to multiply the punishments. Prince has been followed without division by other Circuits in cases involving multiple penalties for

possession with intent to distribute and distribution under 21 U.S.C. 841(a)(1).[4]

Salgado submits that as to counts 2 and 3, he engaged in a single criminal undertaking to sell a kilogram of cocaine to undercover officer Lett by first providing an ounce sample for $1,500.00, and then retaining the remainder until Lett had tested the sample and quickly returned to purchase the rest of that kilo. (2R. 83-98.) The government can properly charge Salgado with both distribution

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[4] See United States v. Gomez, 593 F.2d 210 (3rd Cir. 1979) (en banc), cert. denied, 441 U.S. 948, 99 S.Ct. 2172, 60 L.Ed.2d 1052 (1979); United States v. Hernandez, 591 F.2d 1019, 1021-1022 (5th Cir. 1979) (en banc); United States v. Woods, 568 F.2d 509 (6th Cir. 1978); United States v. Oropeza, 564 F.2d 316, 323-324 (9th Cir. 1977), cert. denied, 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 788 (1978); United States v. Olivas, 558 F.2d 1366, 1368 (10th Cir. 1977), cert. denied, 434 U.S. 866, 98 S.Ct. 203, 54 L.Ed.2d 142 (1977); United States v. Stevens, 521 F.2d 334, 336-337 (6th Cir. 1975); United States v. Curry, 512 F.2d 1299, 1305-1306 (4th Cir. 1975), cert. denied, 423 U.S. 832, 96 S.Ct. 55, 46 L.Ed.2d 50 (1975).

in count 2 and possession with intent to distribute in count 3. Upon his conviction on both counts, the courts below failed to recognize that on these facts the trial court may punish only one of the convictions on counts 2 and 3. Salgado submits that the circuit court reversibly erred in failing to vacate the sentences with instructions to resentence Salgado on either count 2 or 3. See United States v. Wilson, 781 F.2d 1438, 1440 (9th Cir. 1986). There, the circuit court selected which counts would be affirmed and which would be stayed.

REASONS FOR REVIEWING SEVENTH QUESTION

In this case, the Seventh Circuit Court's affirmance of Salgado's sentences on counts 3 and 4 conflicts directly with United States v. Woods, 568 F.2d 509, 512-514 (6th Cir. 1978). Woods had been convicted on four separate counts of an indictment charging distribution of about 111.36 grams of heroin (count 2),

and possession with intent to distribute about 111.36 grams, about 115.37 grams, and about 95 grams. All violations were alleged to have occurred "on or about November 12, 1975." The Woods court affirmed the convictions for counts 1 and 2 and the sentence on count 2. But the case was remanded to the district court with instructions to vacate the sentence under count 1 and the convictions and sentences under counts 3 and 4. The Woods circuit court failed to note whether the district court could resentence Woods on the count 1 possession crime.

In deciding if a district court can properly impose multiple sentences here, one must determine the allowable unit of prosecution. United States v. Universal C.I.T. Corp., 344 U.S. 218, 221, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952). It is clear that the allowable unit of prosecution under 21 U.S.C. 841(a)(1) is a matter within the

discretion of Congress, subject only to constitutional limitations. Bell v. United States, 349 U.S. 81, 82, 75 S.Ct. 620, 621, 99 L.Ed. 905 (1955). Thus for purposes of punishment under 21 U.S.C. 841(a)(1), the reviewer's task is to ascertain whether Congress intended to treat simultaneous constructive possession of several different quantities of cocaine as one act or course of conduct or as multiple acts or courses of conduct. The statutory language of 21 U.S.C. 841(a)(1), however, does not indicate whether such a defendant with multiple stashes commits one or more crimes. As to such cases, the legislative history is equally uninstructive on the appropriate unit of prosecution.

When Congress does not clearly fix the allowable unit of prosecution and its punishment without ambiguity, the ambiguity will be resolved in favor of lenity. Bell v. United States, 349 U.S. 81, 83-84, 75 S.Ct.

620, 622, 99 L.Ed. 905 (1955). In the absence of a clear and unambiguous statement by Congress, the courts are unable to impose multiple sentences for a single course of simultaneous possession of two loads of cocaine at two different places. United States v. Woods, 568 F.2d 509, 512-514 (6th Cir. 1978). Cf. United States v. Griffin, 765 F.2d 677, 682-683 (7th Cir. 1985); United States v. Privett, 443 F.2d 528, 531 (9th Cir. 1971).[5]

Salgado's attorney's failed to raise the multiplicity issues pursuant to Fed.R.Crim.P.

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[5] The Privett court found the three counts stated separate offenses, since different acts of the defendant were involved in each count and since different facts as to the purity of the heroin and its location were involved in each of the counts. The Griffin court held that the defendant's double jeopardy rights were not violated by convictions and sentences on two counts of possession of cocaine, with intent to distribute, where that cocaine found in the car and the cocaine found on defendant's person were of different purities.

12(b)(2). That unauthorized omission did not waive Salgado's Double Jeopardy claims herein. See Menna v. New York, 423 U.S. 61, 63 n. 2, 96 S.Ct. 241, 242 n. 2, 46 L.Ed.2d 195 (1975); United States v. Wyatt, 680 F.2d 1080, 1083 n. 4 (5th Cir. 1982).

Salgado requests this Court hold that while two convictions may result from a single criminal undertaking of two simultaneous possessions of cocaine at separate locations—Bernal's cocaine and cocaine in three different places in apartment 211—the sentences on counts 3 and 4 must be reversed. The full case should be remanded to the district court. Then the prosecution should elect which of counts 2 or 3 a sentence will be imposed upon. The district court should then set aside the conviction on the count not elected by the prosecution. It may then impose sentence only upon the remaining count. See United States v. Colunga, 786 F.2d 655

(5th Cir. 1986); United States v. Bradsby, 628 F.2d 901, 905-906 (5th Cir. 1980). Since the district court may wish to lower the time given in the full sentence package here, all five convictions should be remanded for resentencing on each remaining valid sentence.

REASONS FOR REVIEWING EIGHTH QUESTION

In this case, the Seventh Circuit Court's affirmance of Salgado's 20 years imprisonment sentences on counts 1, 2, 3 and 4, conflicts directly with the applicable enhancement statute, 21 U.S.C. 851, and with United States v. Garcia, 526 F.2d 958 (5th Cir. 1976). On appeal in Garcia, it was contended that the provisions of 21 U.S.C. 851(b) for a second offender sentence were not complied with. The Garcia court in effect noted that at sentencing, the trial court referred to the government's information, but Garcia's "admission of a narcotic conviction" failed to

identify "it as the offense set forth in the information" which the government had filed prior to trial pursuant to 21 U.S.C. 851. Since to the circuit court it was doubtful that a substantial compliance would suffice, the Garcia court affirmed the judgment of conviction, but vacated the sentence and remanded the cause for resentencing so the 21 U.S.C. 851 requirements as to sentencing could be carried out. Similar resentencing was approved in United States v. Purcell, 715 F.2d 561 (11th Cir. 1983) and United States v. Cevallos, 538 F.2d 1122 (5th Cir. 1976).

Invoking the provision of law by written pretrial notice to the trial court and Salgado pursuant to 21 U.S.C. 851(a)(1), the government gave notice to Salgado of its intent to seek enhanced punishment upon conviction in this case, because of

> "... Salgado's September 9, 1983 Illinois conviction for possession of controlled substances with intent to deliver in the

case of People v. Jorge E. Salgado, No. 83-156 before Judge Bailey of the Cook County Criminal Courts." (1R. 45.)

On December 17, 1985, the district court conducted its full sentencing hearing. (5R. 1-40.) On counts 1 to 4, Salgado was sentenced under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B). (App. Attach. Pet. 75 to 77.) First offenders under that statute face a maximum term on Counts 1 and 2 at 15 years (if under one kilogram proven) and at 20 years on Counts 3 and 4 (if over one kilogram proven).

Salgado submits the district court reversibly erred in imposing those sentences of 20 years imprisonment on Counts 1, 2, 3 and 4. Those sentences were in excess of the maximum unenhanced punishment legislated in 21 U.S.C. 841 for first offenders. While those sentences were under the maximum enhanced punishment legislated in 21 U.S.C. 841 for second offenders, the district court was without jurisdiction under 21 U.S.C. 851 to

treat and sentence Salgado to enhanced punishment by reason of one alleged prior conviction, because (1) the government failed to introduce any supporting evidence at sentencing; (2) the government failed to sustain its burden of proof beyond a reasonable doubt on the factual issue alleged for enhancement in the government's notice pursuant to 21 U.S.C. 851 (a)(1); and (3) pursuant to the Fifth Amendment and 21 U.S.C. 851(b), all courts must treat as a "denial" Salgado and his counsel's remaining silent at sentencing on the issue of whether Salgado's prior conviction was "the exact conviction" alleged in the government's enhancement notice. (5R. 1-40.)

A district court is without authority to impose an enhanced sentence unless the statutory requirements of 21 U.S.C. 851(a)(1) and (b) were met. Hardy v. United States, 691 F.2d 39, 42 (1st Cir. 1982). Strict

compliance with 21 U.S.C. 851(b) is required. United States v. Ramsey, 655 F.2d 398, 400 n. 7 (D.C. Cir. 1981). The government, however, did not complain of its and the district court's noncompliance with 21 U.S.C. 851. Thus, the government waived any question regarding "trial error" on appeal by not objecting to the district court's procedures during the sentencing hearing on December 17, 1985. See Ortega v. State, 668 F.2d 701 (Tex.Cr.App. 1983)(Opinion on original submission).

The trial court's sentences on counts 1, 2, 3 and 4 are erroneous and must be set aside. Is Salgado entitled to more than a resentencing hearing? At the resentencing hearing, the government should be barred from again seeking sentences enhanced by prior convictions. Having received "one fair opportunity to offer whatever proof it could assemble," Burks v. United States, 437 U.S. 1,

16, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978), the government is not entitled to another opportunity. Congress used the reasonable doubt standard to indicate that in enhancement sentencing proceedings, it is the government, not the defendant, that should bear "almost the entire risk of error." Addington v. Texas, 441 U.S. 418, 424, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979).

Salgado's initial sentencing enhancement proceeding was supposed to be like a trial on the question of guilt or innocence. Thus, with respect to any enhancement penalty at his resentencing, the protection afforded by the double jeopardy clause to one acquitted by a jury is available to Salgado. See Bullington v. Missouri, 451 U.S. 430, 447, 101 S.Ct. 1852, 1862, 68 L.Ed.2d 270 (1981).

REASONS FOR REVIEWING NINTH QUESTION

In this case, the Seventh Circuit's affirmance of the trial court's imposition of

a special parole term on counts 2 and 3 on December 20, 1985, conflicts directly with Hazelwood v. Arnold, 539 F.2d 1031 (4th Cir. 1976). Additionally in this case, the Seventh Circuit's affirmance of the trial court's imposition of a special parole term on count 3 conflicts directly with 21 U.S.C. 841(b)(1)(A) and United States v. Santamaria, 788 F.2d 824, 829 (1st Cir. 1986). In Santamaria, the circuit court vacated the special parole term imposed after conviction, like Salgado's on count 3, of knowing possession with intent to distribute one kilogram or more of a mixture containing cocaine in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), since a special parole term is not authorized for an offense that involves one kilogram or more of cocaine. This Court should hold that the special parole term is not legally part of Salgado's sentence on Count 3.

In Hazelwood, the circuit court remanded for resentencing. The district court reversibly erred in sentencing Hazelwood in abstentia by later imposing special parole terms to the existing sentences on counts 2 and 3. See Fed.R.Cr.P. 32(a) and 43; United States v. Behrens, 375 U.S. 162, 84 S.Ct. 295, 11 L.Ed.2d 224 (1963). All circuit courts that have addressed the question have held that a prisoner must be present and be represented by counsel when the district court amends an existing sentence by adding a mandatory parole term.[6]

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[6] Mayfield v. United States, 504 F.2d 888 (10th Cir. 1974); Thompson v. United States, 495 F.2d 1304 (1st Cir. 1974); United States v. Mack, 494 F.2d 1204 (9th Cir. 1974); Caille v. United States, 487 F.2d 614, 616 (1973). See also Birdwell v. United States, 345 F.2d 877 (9th Cir. 1965); and James v. United States, 348 F.2d 430, 432 (10th Cir. 1965); United States v. Rozanc, 326 F.2d 487 (3rd Cir. 1964).

As to Counts 2 and 3, Salgado also submits that the district court erred in imposing a special parole term three days after the sentencing hearing. The district court's written judgment reads in part: "IT IS FURTHER ORDERED that the defendant shall serve a special parole term for life." (Pet.App.A. 34.) By a December 20, 1985 docket entry, the clerk of the district court noted that the district court had imposed as part of the sentences special parole terms of life on both Counts Two and Three. At the sentencing hearing, the district judge orally said (5R. 38): "The court also will impose a lifetime special parole term on the defendant."

A special parole term on counts 2 and 3 was neither specifically imposed orally on December 17, 1985, nor incorporated into the written judgment of the district court on December 17, 1985. Thus, there is no need to

resort to the rule that "where there is a conflict between the oral and the written versions of a sentence, the former is controlling." United States v. Clark, 741 F.2d 699, 707 (5th Cir. 1984); see also Schurmann v. United States, 658 F.2d 389, 391 (5th Cir. 1981).

REASONS FOR REVIEWING TENTH QUESTION

The lifetime special parole term imposed in this case conflicts directly with Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Solem holds that the Constitution requires the sentence to be proportionate to the crime for which a defendant has been convicted. Congress has determined that the proper range of punishment for a first offender is respectively 15 or 20 years for possession of less or more than one kilogram of cocaine, with intent to distribute. Therefore, Salgado submits any imposed special parole term should not exceed Congress'

determination as to what is the proper range of punishment for the very crime for which the defendant was convicted.

Most courts have agreed that a lifetime special parole can be imposed under 21 U.S.C. 841(b)(1)(B).[7] However, no court has considered this question in light of the Solem reasoning. Rather, those courts have considered the constitutionality of 21 U.S.C. 841 (b)(1)(B) and related matters, including arguments that a special parole term should

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[7] See United States v. Waldon, 578 F.2d 966, 972 (3rd Cir. 1978); United States v. Rich, 518 F.2d 980, 986 (8th Cir. 1975), cert. denied, 427 U.S. 907, 96 S.Ct. 3193, 49 L.Ed.2d 1200 (1976); United States v. Dayton, 592 F.2d 253, 254 (5th Cir. 1979), rehearing denied en banc, 604 F.2d 931, cert. denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980), supplemented cert. denied, sub nomine Flanagan v. United States, 445 U.S. 971, 100 S.Ct. 1665, 64 L.Ed.2d 249 (1980); Walberg v. United States, 763 F.2d 143, 148-149 (2nd Cir. 1985); United States v. Bridges, 760 F.2d 151, 153 (7th Cir. 1985), and cases cited therein. Cf. United States v. Tebha, 578 F.Supp. 1398 (N.D. Cal. 1984), reversed, 770 F.2d 1454 (9th Cir. 1985).

not exceed the actual prison term imposed. Through 21 U.S.C. 841(b)(1)(B), Congress has granted the trial courts discretion in assessing special parole terms. However, only such term whose length is proportionate to the offense, may constitutionally be imposed. It follows the district court may not constitutionally impose any special parole term whose length is above the maximum provided by law for the primary offense. In light of the allegata, probata and the trial court's instructions authorizing conviction only for the lesser included unenhanced offenses, Salgado could have received no more than 15 years imprisonment on counts 2, 3 and 4 plus a constitutionally proportionate special parole term of no more than 15 years.

REASONS FOR REVIEWING ELEVENTH QUESTION

Salgado believes that this Court should not apply the concurrent sentence doctrine in this case. Its application would be improper.

There is a significant likelihood that with any of the five convictions going unreviewed, Salgado will suffer adverse collateral consequences (lengthened incarceration = reduced parole opportunity). Without a reversal of count 4's conviction, the Parole Commission has noticed Salgado to plan on 120^{+} months incarceration. (Pet.App.A. 91-92.)

Salgado suggests it would be improper for this Court to invoke that doctrine because (1) numerous errors need fixing; (2) judicial correction of those errors will greatly affect the time at which Salgado becomes eligible for parole; and (3) there are numerous reasons for abolition of that doctrine. See United States v. Escobar DeBright, 730 F.2d 1255 (9th Cir. 1984). Compare Ray v. United States, ___ U.S. ___, 107 S.Ct. 454, 93 L.Ed.2d 400 (1986).

CONCLUSION

For those reasons, Salgado respectfully suggests that the question presented

previously to the circuit court is ripe for resolution by this Court. However, without resolving the questions presented, this Court could grant this petition for writ of certiorari and order the district and circuit courts' judgments vacated, and the cause remanded to the district court for resentencing or to the circuit court to conduct such further or other proceedings as may be proper to afford that court and the parties an opportunity to address all the questions presented by this petition. See Pecheur Lozenge Co. v. National Candy Co., 315 U.S. 666, 62 S.Ct. 853, 86 L.Ed. 1103 (1942). Of course, this Court may wish to grant certiorari here in light of the significant impact Salgado's questions will have on all lower federal courts. Here this Court could resolve, once and for all, this case's trial and appellate issues. Those issues are of crucial importance. The new November 1986

drug legislation has greatly altered many sentencing provisions of the controlled substances laws to provide for much more quantity enhancement. This Nation is trying to not lose its War on Drugs. That War is ultimately being waged, in courtrooms throughout this country, when prosecutors attempt to properly obtain convictions and long sentences for serious traffickers. The Bench and Bar need this Court's immediate instructions on "how to do it right the first time." Salgado provides that teaching tool.

DATED: February 18, 1987.

Respectfully submitted by
Petitioner's Attorney,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

NO. _____

JORGE SALGADO, Petitioner

V. UNITED STATES OF AMERICA, Respondent

APPENDIX ATTACHED TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

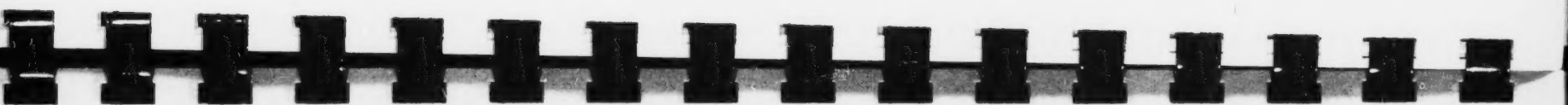
RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The Constitution's Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution's Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."



28 U.S.C. 1254(1) provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ....
> > (June 25, 1948, C. 646, 62 Stat. 928.)

28 U.S.C. 1291 provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.
> (As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

18 U.S.C. 3231 provides in part:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

(June 25, 1948, C. 645, 62 Stat. 826.)

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.
> (June 25, 1948, ch 645, § 1, 62 Stat. 684; as amended Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717.)

18 U.S.C. 4205 provides in part:

> (a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.
>
> (b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but

shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.
(Pub. L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 222.)

18 U.S.C. 4206 provides:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays,

after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: Provided, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: Provided, however, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.
(Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 223.)

18 U.S.C. 4207 provides:

> In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:
>
> (1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;
>
> (2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;
>
> (3) presentence investigation reports;
>
> (4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge;
>
> (5)[1] a statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim; and
>
> (5)[1] reports of physical, mental, or psychiatric examination of the offender.

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[1] So in original. Two paragraphs (5) have been enacted.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available. (Pub.L. 944-233, § 2, Mar. 15, 1976, 90 Stat. 224.)

21 U.S.C. 812 provides schedules of controlled substances as follows:

Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter.

*****

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

*****

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: ...

> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves (including cocaine and ecgonine and their salts, isomers, derivatives), and salts of isomers and derivatives, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(Pub.L. 91-513, Title II, § 202, Oct. 27, 1970, 84 Stat. 1247; Pub.L. 95-633, Title I, § 103, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98-473, Title II, §§ 507(c), 509(b), Oct. 12, 1984, 98 Stat. 2071, 2072.)

21 U.S.C. 841 provides (footnote omitted):

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ....

Penalties

(b) Except as otherwise provided in section 845 or 845a of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

(I) coca leaves;

(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both

(B) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than

$125,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

*****

(c) Special parole term

A special parole term imposed under this section or section 845 or 845a of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was

spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 or 845a of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2068, 2070.)

21 U.S.C. 843 provides in part:

Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

Penalties

(c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.
(Pub.L. 91-513, Title II, § 403, Oct. 27, 1970, 84 Stat. 1263; Pub.L. 95-633, Title II, § 202(b)(3), Nov. 10, 1978, 92 Stat. 3776.)

21 U.S.C. 846 provides:

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the minimum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
(Pub. L. 91-513, Title II, § 405A, as added Pub. L. 98-473, Title II, § 503(a), Oct. 12, 1984, 98 Stat. 2069.)

21 U.S.C. 851 reads: Proceedings to establish previous convictions

(a) Information filed by United States Attorney. (1) No person who stands convicted of an offense under this part [21 USCS §§ 841 et seq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.
(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction. If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any

challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing. (1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.
(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be

waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence. (1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior conviction, the court shall proceed to impose sentence upon him as provided by this part [21 USC §§ 841 et seq.]
(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part [21 USC §§ 841 et seq.] The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations. No person who stands convicted of an offense under this part [21 USC §§ 841 et seq.] may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.
(Oct. 27, 1970, P. L. 91-513, Title II, Part D, § 411, 84 Stat. 1269.)

28 U.S.C. 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect substantial rights of the parties.
> (May 24, 1949, C. 139, § 110, 63 Stat. 105.)

Fed.R.Cr.Proc. 32(a)(1) provides:

> (1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall
>
> > (A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);
> >
> > (B) afford counsel an opportunity to speak on behalf of the defendant; and
> >
> > (C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.
>
> The attorney for the government shall have an equivalent opportunity to speak to the court.

Fed.R.Cr.Proc. 43(a) provides:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

Fed.R.Cr.Proc. 52 provides:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

BRF121

86 1386

Supreme Court, U.S.
FILED
FEB 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. _____

JORGE SALGADO,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ATTORNEY FOR PETITIONER

BRF121

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ATTORNEY FOR PETITIONER

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Supreme Court of the United States

No. A-546

JORGE SALGADO,
Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including March 5, 1987.

/s/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Dated this 30th day of January, 1987.

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 5, 1986.

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 85-3209 vs. JORGE SALGADO, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 85 CR 357 John A. Nordberg, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

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* The Honorable William J. Campbell of the Northern District of Illinois, sitting by designation.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

In the
United States Court of Appeals
For the Seventh Circuit

No. 85-3209

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

JORGE SALGADO,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 85 CR 357—John A. Nordberg, Judge.

ARGUED SEPTEMBER 12, 1986—
DECIDED DECEMBER 5, 1986

Before POSNER and FLAUM, Circuit Judges, and CAMPBELL, Senior District Judge.*

POSNER, Circuit Judge. A jury convicted Salgado of federal narcotics offenses, and he was sentenced to 20 years in prison, fined $500,000, and ordered to serve a special

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* Hon. William J. Campbell of the Northern District of Illinois, sitting by designation.

parole term for life. His appeal challenges the district court's denial of his motions (1) to disclose the identity of the government's confidential informant and (2) to suppress evidence seized from Salgado's apartment.

1. The charges against Salgado arose out of a transaction in which he sold an ounce of cocaine to a Chicago police officer, Lett, for $1,500. The transaction was arranged by a confidential government informant named Alan, and the sale took place in Alan's home and in his presence. Before trial, Salgado moved the court to order the government to reveal the names of its confidential informants, in particular one who had been a "material witness" to the transaction—who was of course Alan. The government opposed the motion because the informant was involved in other undercover investigations and his safety might be compromised by disclosure of his identity; also he had not been an active participant in

the offenses charged and the government didn't intend to call him as a witness. The court denied the motion to disclose. At trial Lett testified that "Al" had introduced him to Salgado and had given Salgado both a knife to cut the foil in which the cocaine was wrapped and a plastic bag in which to place the cocaine sold to Lett. He also testified that Salgado had told him that Al would know where to reach Salgado for larger cocaine purchases. Defense counsel then renewed his motion for disclosure of "Al's" identity, arguing that he needed to interview him in order to determine whether Salgado might have a defense of entrapment. The court granted the motion and ordered that Salgado's counsel be allowed to interview the informant at the office of the U.S. Attorney. This was done the same afternoon, a Friday. Trial was to resume, and did resume, on Monday. When trial resumed, the defense did not call Alan as a witness, or

offer any evidence concerning his role in the transaction, or request a continuance to enable a more thorough investigation of Alan's role, although the judge had indicated he would grant a continuance if an adequate investigation could not be conducted before the trial resumed. No doubt, Salgado's counsel lost interest in Alan because his statements at the interview confirmed Lett's version of the transaction, thus scotching the possibility of using Alan to establish a defense of entrapment.

In these circumstances it is academic whether the district judge's initial ruling, denying the motion to reveal Alan's identity to the defense, violated the standard of Roviaro v. United States, 353 U.S. 53 (1957), which requires comparing the defendant's need for access to the informant to prepare his defense with the physical danger to the informant, and with the danger of compromising

other government investigations, if access is granted. The judge eventually granted the motion, and there is no indication that Salgado was prejudiced by the delay. If defense counsel had needed more time to explore Alan's role in the transaction he could have asked for a continuance—was indeed invited by the judge to do so. But as the interview with Alan produced no suggestion that Salgado might have been entrapped into selling cocaine to officer Lett—an inference anyway highly improbable in light of the extensive evidence that Salgado was selling drugs on a large scale—defense counsel naturally saw no point in pursuing the matter of Alan's participation in the transaction any further. United States v. Tucker, 552 F.2d 202 (7th Cir. 1977), on which Salgado relies, thus is inapposite.

We reject Salgado's argument that the results of the interview must be disregarded

on the ground that Alan was intimidated by being interviewed at the U.S. Attorney's office in the presence of federal agents. He was a government informant, and therefore potentially at risk; it would have been as "intimidating" to be told to go to defense counsel's office for an interview. Salgado argues that Alan should have been interviewed in "neutral surroundings," without specifying where they might be found.

2. The more difficult issue relates to the motion to suppress. When Salgado left Alan's home after selling the ounce of cocaine to officer Lett, federal agents followed him and after a half hour arrested him on the street, searched him, and found several keys, a portable telephone, and a receipt from a lock company. The receipt revealed that the company had, a few days earlier, rekeyed the door lock to an apartment at 2580 West Golf Road in a suburb of Chicago (the sale of

cocaine and the arrest had occurred in Chicago), for a customer named "Salgado."

During the negotiations with Lett, Salgado had used his portable telephone to summon an associate, Bernal—who, as a security precaution, was driving around with the cocaine for the deal—to Alan's home to complete the deal. After Bernal arrived, Salgado was called on the portable phone, had a conversation in Spanish, and then told Lett, "You see, I'm a busy man. That was an order for five kilos."

When Bernal left, the agents followed him too, arrested him, and found in his car what appeared to be additional cocaine that Bernal had brought to Alan's residence but had not sold to Lett. Bernal told the agents that the cocaine had come from 2600 West Golf Road, and they went there, and encountered the agents who had arrested Salgado and who had then proceeded with Salgado's keys to 2580. 2580

West Golf Road and 2600 West Golf Road are two apartment buildings, under common management, located about 100 yards apart. The janitor told the agents that Salgado had moved recently to 2580. Bridges, a Chicago police officer who (like Lett) was working with the federal drug agents, used the keys taken from Salgado to open Salgado's apartment. The apartment was unfurnished and there was no one in it. Bridges, accompanied by federal agents, glanced in each room. They touched nothing and opened no closets or other closed areas. Bridges saw a white plastic box, a balance scale, and a money-counting machine. He and the agents sealed the apartment, then waited in the hallway.

About four hours later another group of agents appeared with a search warrant and made a thorough search. They seized the items that Bridges had seen, plus much else besides, including a large amount of cocaine. The

warrant was based on an affidavit by officer Lett describing the circumstances in which Salgado and Bernal had been arrested and establishing that the apartment to be searched was indeed Salgado's and was probably the place where Bernal had gotten the cocaine. The warrant authorized the seizure of cocaine, currency, scales, packaging materials, etc., but did not refer specifically to anything that officer Bridges (or the agents accompanying him) had seen. Nor had Lett's affidavit, on the basis of which the warrant was issued, referred to anything that Bridges' group had seen. Another warrant was obtained later and executed but it need not be discussed separately.

Salgado argues that the initial search of the apartment by Bridges and others (but we shall ignore the others to simplify exposition) violated the Fourth Amendment. The government argues that, even if this were

so, it would not help Salgado. The only remedy against an unlawful search, in a criminal proceeding, is the suppression of its fruits; and since the evidence used against Salgado was obtained not from the initial search but from the execution of a warrant that had been issued without any reliance on what Bridges had seen, there were no fruits. Bridges' search was immaterial.

The matter is more complicated than this, in two respects. The first and lesser is that the absence of any causal connection between Bridges' search and the issuance of the warrant is not clear as the government asserts. Granted, neither the warrant itself, nor Lett's affidavit on which the warrant was based, refers to anything Bridges saw. But Lett and his associates might not have sought a warrant had they not known from Bridges' search that executing such a warrant would yield valuable evidence for trial. This

assumes of course that whoever participated in the decision to seek the warrant had spoken to Bridges, but that is entirely possible. The government says its prosecutors who applied for the warrant didn't know about Bridges' search, and in support it cites to a page in the appendix. The cited page does not support the statement, and in any event the government does not claim that the drug agents who advised the prosecutors to seek a search warrant did not know about the search and did not give them information obtained from it, without disclosing the source.

Despite this, we think it reasonably plain that the search warrant would have been applied for, issued, and executed even if Bridges had never conducted the allegedly unlawful search. The arrest of Bernal with cocaine—Salgado's cocaine—in his possession, coupled with Bernal's statement that it came from 2600 West Golf Road and the janitor's

that Salgado had moved recently from 2600 to 2580, made it more than likely that a search of Salgado's apartment at 2580, which the arresting agents knew Salgado had recently had rekeyed, would turn up contraband or other evidence of Salgado's drug dealings. Thus, information in the agents' possession that owed nothing to Bridges' search abundantly established probable cause for obtaining a warrant—so much so that the agents would have been derelict in their duty had they failed to apply for a warrant based just on what they knew, independently of what Bridges learned and may or may not have told them. Since the warrant would have been obtained and executed even if Bridges had never made his search, Salgado was not hurt by the search, at least in this criminal proceedings. Segura v. United States, 468 U.S. 796 (1984), a factually similar case, is controlling on this point.

Our conclusion that the warrant was not "tainted" by the earlier search might seem to end the case, but it merely brings on the second and bigger complication. Salgado argues that even if Bridges' search did not taint the evidence obtained only by virtue of the warrant—that is, the evidence that Bridges had never laid eyes on and therefore could not have been thought to have seized before the execution of the warrant—the evidence that Bridges did see was seized in the moment when Bridges saw it (during what Salgado contends is an illegal search) and thus could not have been seized later by the execution of the warrant. And that evidence, he contends, must be suppressed regardless of the sufficiency of Lett's affidavit.

The idea that when Bridges saw something he "seized" it, so that when a different group of officers came along later and carted it off pursuant to their search warrant they were not

"seizing" it, is semantically intriguing but is unrelated to the policies that animate and limit the exclusionary rule that has been grafted onto the Fourth Amendment. The legal issue is whether the fruits of a search and seizure made pursuant to a valid warrant, amply supported by probable cause obtained without violating anybody's rights, should be excluded from a criminal proceeding because another officer made an illegal search, assuming it was illegal. We think the answer is "no." The exclusionary rule is a sanction, and sanctions are supposed to be proportioned to the wrongdoing that they punish. The exclusionary rule punishes the government for obtaining evidence by unconstitutional means. It does this by forbidding the government to use such evidence to convict the person whose constitutional rights it violated. It does not go further and forbid the government to convict him on the basis of lawfully obtained

evidence. It thus does not seek to make the person whose rights have been violated better off than he would have been if no violation had occurred. We conclude that the exclusionary rule does not require the exclusion of evidence that would have been obtained lawfully, just in order to punish a search that did not harm the defendant in any sense relevant to a criminal proceedings, because the search was not a necessary step in obtaining evidence used to convict him. Since the evidence would have been obtained anyway, the alleged violation of Salgado's rights was not a cause, in the legal sense, of his conviction. Maybe Salgado's privacy was invaded, though in rather an ethereal sense, by the fact that Bridges laid eyes on his drug paraphernalia. But for such invasions the only remedy is a tort remedy unless evidence that would not otherwise have been obtained is

used in a criminal proceeding against the owner of the paraphernalia.

Salgado argues, however, that the Supreme Court's decision in Segura requires the exclusion of the things Bridges saw. Segura was arrested in the lobby of his apartment building. The arresting officers took him to his apartment and entered it without his permission or that of the other occupants, conducted a cursory "glance around" search similar to Bridges' search in this case, and then secured the premises for 19 hours while a search warrant was obtained and executed. The court of appeals held that the initial search was illegal, because there wasn't the kind of emergency ("exigent circumstances," in legalese) that would justify searching a residence without a warrant (or consent); so the items seen during that search had to be suppressed. The government did not seek further review of this part of the court of

appeals' decision. The court of appeals also held, however, that the search warrant, not having been based on the initial (and in the court's view unlawful) search, was valid; hence the items seized pursuant to it, other than the items seen in the initial search, were admissible. The only issue considered by the Supreme Court was the admissibility of these other items. Our case involves the admissibility of the items first seen, then seized. Salgado argues that even if the warrant was not tainted by the search, items seen in that search and thereby (he argues) "seized" could not be "reseized" later, however valid the warrant pursuant to which they were seized.

We disagree that the Supreme Court's decision supports Salgado. The issue of the admissibility of the "seen" items was not before the Supreme Court, those items having been held inadmissible in a part of the court

of appeals decision that the government did not seek further review of. The closest the Supreme Court came to saying that the initial search required exclusion of the items seen in it was in the statement, "As the Court of Appeals held, absent exigent circumstances, the entry may have constituted an illegal search, or interference with petitioners' privacy interests, requiring suppression of all evidence observed during the entry." Id. at 811 (emphasis in original). This passage not only is dictum (i.e., removable without damage to the rest of the opinion), but it appears in a part of the opinion that only two members of the Court joined, see id. at 797.

Thus Segura does not answer the question whether illegally seized evidence (if sight is seizure) can ever be cured of its taint by being "reseized" under a lawful warrant—that is, a warrant not dependent on information obtained from the illegal seizure. Suppose

one team of officers seizes a piece of evidence illegally for which another team has already obtained, but not yet executed, a lawful search warrant—which is one way to describe the present case. Then even if the initial search and seizure had never taken place the evidence would still have come into the hands of the government lawfully and could have been used in the defendant's trial. There would be no closer causal relationship between the initial search and the introduction of evidence at trial than in a case where the police have two independent sources of information regarding the location of a corpse, one source having been coerced illegally, the other being lawful; evidence of the location, having an independent untainted source, would be admissible. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.); Nix v. Williams, 467 U.S. 431, 441-44 (1984) (dictum); United States v.

Palumbo, 742 F.2d 656, 659-60 (1st Cir. 1984). This principle, which underlies our earlier holding that the seizure of the items not seen by Bridges was not tainted by Bridge's search, applies equally to the issue whether the search made it impossible for the items he did see to be seized later pursuant to a valid warrant, on the theory that what is seen is seized and cannot be reseized. The considerations are the same. For constitutional violations that do not increase the victim's risk of being convicted of a crime, because they do not produce evidence that would not have been obtained without a violation, the victim's remedy is a tort suit rather than to have his conviction set aside.

Our conclusion is that whether there is an interim illegal seizure of evidence is irrelevant to the issue of exclusion, provided there is (as there is here) very great confidence that the evidence would have been

obtained for use at trial even if there had not been that seizure. This conclusion agrees with that reached by the other courts of appeals in similar cases. See United States v. Silvestri, 787 F.2d 736 (1st Cir. 1986), and cases cited there. It is also strongly supported by the Supreme Court's recent endorsement, in the Nix case, of the "inevitable discovery" exception to the exclusionary rule, see 467 U.S. at 444-48, and by the Court's rationale: the police should not be put "in a worse position than they would have been in if no unlawful conduct had transpired," id. at 445 (emphasis in original). Yet that would be the result if because of Bridges' search the government were forbidden to introduce evidence that would have been obtained if that search had never taken place. A contrary result was reached in United States v. Griffin, 502 F.2d 959, 961

(6th Cir. 1974)(per curiam), but that was before Nix was decided.

We do not suggest that in cases where a warrant is necessary for a lawful search, the government can use evidence seized without a warrant if it can show that it would have gotten a warrant if it had asked for one. That would defeat the purpose of requiring a warrant, which is to interpose a neutral judicial officer between the police and its quarry and also (and maybe more important) to require that the grounds for probable cause be set forth before rather than after the search—after is too easy. To excuse getting a warrant on such grounds would be like saying that lynching a man is okay provided you have a well-grounded belief that if tried he would have been convicted and sentenced to death and the sentence carried out. But in this case the government did obtain a warrant. The only question is whether the warrant should be

treated as a nullity regarding those items that Bridges had seen (and maybe should not have seen) earlier. We hold that the items that Bridges saw and that later were seized pursuant to a valid warrant were admissible at his criminal trial even if Bridges can be said to have "seized" them by seeing them in the course of his search.

We therefore need not consider, and do not decide, whether the search Bridges conducted was lawful. On the rather similar facts of Segura the Second Circuit, in the part of its decision not reviewed by the Supreme Court, held that the initial search had been illegal. See United States v. Segura, 663 F.2d 411, 414-15 (2d Cir. 1981). The Second Circuit was unwilling to embrace the proposition that any time you arrest a drug dealer you can enter his home without a search warrant in order to prevent any confederates who may be lurking there from destroying evidence. Courts take a

very hard line against the search of a person's home without a warrant (or consent, but that is not a factor here), and therefore demand a genuine showing of emergency before they will excuse the failure of the police to get a warrant. See, e.g., Welsh v. Wisconsin, 466 U.S. 740, 748-54 (1984); Llaguno v. Mingey, 763 F.2d 1560, 1564 (7th Cir. 1985) (en banc) (plurality opinion). A mere possibility that evidence will be destroyed—a possibility that exists any time a drug dealer is arrested outside of his home or other place of (illicit) business—is not enough. Otherwise the requirement of a warrant would have little meaning in the investigation of drug crimes. A man who lived in New York might be arrested on a trip to Florida, and the police would argue that they could search his home in New York; maybe he had an arrangement with confederates there whereby if he didn't call in at stated

intervals they should clear out with all the evidence.

The present case is not quite so stark. The police knew that Salgado had at least one confederate (Bernal), that Salgado's apartment almost certainly was the center of the drug operation and the place where the drugs were stored for distribution, and that Salgado was carrying around a portable telephone, implying that he was in continuous telephonic contact—with Bernal certainly but possibly with someone else as well, someone at the apartment who might become alarmed either if Salgado did not call in or if he did not answer his portable phone when called on it. The person who called Salgado may not have been the customer for the five kilos but an associate of Salgado's, relaying an order received at the apartment. The size of the "order" (assuming Salgado wasn't just puffing) was indicative of a large operation, not a two-man

(Salgado and Bernal) operation. Maybe the situation presented an emergency justifying the agents in securing Salgado's apartment while they got a warrant. Some decisions have upheld quick security checks in comparable circumstances. See, e.g., United States v. Vasquez, 638 F.2d 507, 531-32 (2d Cir. 1980); United States v. Webster, 750 F.2d 307, 326-28 (5th Cir. 1984). Others, however, have condemned them, see, e.g., United States v. Veillette, 778 F.2d 899, 902-03 (1st Cir. 1985); United States v. Kolodziej, 706 F.2d 590, 595-97 (5th Cir. 1983), and maybe this circuit must be ranged on the side of the condemnors on the strength of United States v. Gamble, 473 F.2d 1274, 1277 (7th Cir. 1973), and United States v. Cooks, 493 F.2d 668, 672 (7th Cir. 1974). One can argue that the officers in this case should have taken additional steps to find out whether there really was anyone in Salgado's apartment, by

asking the janitor or neighbors or simply by listening at the door for signs of activity inside. The counterargument is that judges have no competence to evaluate the minutiae of police practice and the relative effectiveness of alternative tactics for securing potential evidence from destruction.

We need not weigh these arguments in this case. We hold that the items seen by officer Bridges were lawfully seized later pursuant to a valid warrant, even if the initial search was (though we do not decide whether it was) unlawful.

AFFIRMED.

A true Copy:

Teste: /s/ J. Grabowski, Deputy
Clerk of the United States Court
of Appeals for the Seventh Circuit

United States of America vs.

JORGE SALGADO
DEFENDANT

United States District Court for THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
DOCKET NO. 85 CR 357-1

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 12 17 85

COUNSEL

X WITH COUNSEL DENNIS A. BERKSON

PLEA

X GUILTY, and the court being satisfied that there is a factual basis for the plea (sic)

FINDING & JUDGMENT

There being a verdict of
X GUILTY.

Defendant has been convicted as charged of the offense(s) of knowingly, willfully and unlawfully possessing and distributing cocaine, a Schedule II Narcotic Drug Controlled Substance IN VIOLATION OF TITLE 21, UNITED STATES CODE, SECTIONS 841(a)(1); SECTION 846(1) and SECTION 843(b) as charged in all counts of the indictment

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and

DISTRICT CLERK'S RELEVANT DOCKET ENTRIES

12/17/85 63 Sentencing of defendant (Counts 1-5) (The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWENTY (20) YEARS on all counts. Said sentence on each of counts 1 through 5 to run concurrently with each other. IT IS ORDERED that the defendant is fined in the sum of $500,000.00. Any property of value acquired through the civil forfeiture proceeding is to be credited toward the $500,000.00 fine. IT IS FURTHER ORDERED that the defendant shall serve a special parole term for life.) (JUDGE NORDBERG) (Dkt'd 12/26/85).

12/20/85 Issued judgment and commitment to U.S. Marshal (Counts 1-5) (Dkt'd 12/26/85)

64 Order filed (Judgment and commitment order of December 17, 1985 is corrected to read "IT IS FURTHER ORDERED that the defendant shall serve a special parole term for life under counts 2 and 3.") (JUDGE NORDBERG) (Dkt'd 12/26/85).

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge JOHN A. NORDBERG

Case Number 85 CR 357-1 Date December 20, 1985

Case Title UNITED STATES V. JORGE SALGADO

*****

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) Judgment is entered as follows:

Judgment and commitment order of December 17, 1985 is corrected to read "IT IS FURTHER ORDERED that the defendant shall serve a special parole term for life under counts 2 and 3."

*****

Document #

64

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	No. 85 CR 357
v.	)	
	)	Judge John A. Nordberg
JORGE SALGADO and HERNANDO BERNAL,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

*****

Motions of Salgado and Bernal

1. Motion to Suppress Evidence

Defendant's motion to suppress evidence obtained from searches of Apartment No. 211 at 2580 W. Golf Road is denied. The searches were conducted pursuant to valid warrants, and defendants have raised no facts which would negate the validity of such warrants.

*****

E N T E R:

/s/ John A. Nordberg
JOHN A. NORDBERG
United States
District Judge

Dated: September 5, 1985

SEARCH WARRANT ON WRITTEN AFFIDAVIT

UNITED STATES DISTRICT COURT	Northern District of Illinois

UNITED STATES OF AMERICA
V.

Apartment, 211 of 2580 Gulf Road Glenview, Illinois	TO: Augustus Lett, Chicago Police Officer and DEA Task Force Agent and other DEA and Task Force agents.

Affidavit(s) having been made before me by the below-named affiant that he/she has reason to believe that (on the person of) (on the premises known as) Apartment 211 of 2580 Gulf Road, Glenview, Illinois.
in the Northern District of Illinois there is now being concealed certain property, namely Cocaine, United States Currency, books, papers, documents, weighing scales, and other packaging materials.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above-described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

YOU ARE HEREBY COMMANDED to search on or before June 7, 1985 (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (in the daytime — 6:00 A.M. to 10:00 P.M.) (at any time in the day or

night)* and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant to Magistrate Balog as required by law.

NAME OF AFFIANT	SIGNATURE OF JUDGE** OR U.S. MAGISTRATE	DATE/TIME ISSUED
Augustus Lett	/s/James T. Balog	8:08 pm 5-31-85

---

* If a search is to be authorized "at any time in the day or night" pursuant to Federal Rules of Criminal Procedure Rule 41(c), show reasonable cause therefor.

AFFIDAVIT FOR SEARCH WARRANT

United States District Court	Northern District of Illinois
United States of America vs. Apt 211 of 2580 Gulf Road, Glenview, Illinois	Name ... of Federal Magistrate Magistrate James T. Balog

The undersigned being duly sworn deposes and says: That he/she has reason to believe that

☒ on the premises known as — Northern district of Illinois

Apartment 211 of 2580 Gulf Road, Glenview, Illinois.

The following property is concealed:

Cocaine, United States currency, books, papers, documents, weighing scales, and other packaging materials.

Affiant alleges the following grounds for search and seizure[2]

The above described items are contraband, fruits, and evidence of the crime, 21 U.S.C. §841(a)(1).

☐ See attached affidavit which is incorporated as part of this affidavit for search warrant.

Affiant states the following facts establishing the foregoing grounds for issuance of a Search Warrant

---

[2] If a search is to be authorized "at any time in the day or night" pursuant to Federal Rules of Criminal Procedure 41(c), show reasonable cause therefor.

I, Augustus Lett, depose and state as follows, under oath:

1. I am a Chicago Police officer assigned to the DEA/Chicago Police Department Task Force. I have been a police officer for 24 years, and I have 24 years experience in drug enforcement.

2. At about 2:00 P.M. on todays date, May 31, 1985, a confidential informant told me that the subject Jorge Salgado would sell to me in an undercover capacity a kilogram of cocaine for $45,000.

3. Pursuant to this introduction, I met with Mr. Salgado at 5521 W. Warwick, Chicago, Illinois. Mr. Salgado arrived at about 2:30 P.M., and he had with him a black portable telephone. Mr. Salgado stated he did not carry the stuff, but rather had someone else do it for him. He further stated that the person helping him would arrive soon, and he wanted to see the money.

4. I then went outside with Salgado and met with undercover Task Force Agent Clarence Travis who was waiting in a car nearby. Agent Travis displayed a roll of bills totalling $45,000.00 which Salgado counted and returned.

5. I then went back to the Warwick house with Salgado. At this time a latin male was present. Present on the table was a brown sealed package about 15 inches long, 6 inches wide and 3 inches high. Salgado opened the package revealing a large plastic bag containing chunky white powder. The total amount of the powder looked to me to be about one kilogram of cocaine. Salgado said it was "good stuff". Salgado agreed to sell me for $1500 one ounce to test. I then purchased the one ounce from Salgado and left at about 2:50 P.M.

6. I then field tested the ounce of white powder Salgado sold me and it tested positive for cocaine.

7. While at the Warwick residence, Salgado recieved (sic) a telephone call on his portable phone. He said he just got an order for five kilograms.

8. I then related to the other Task Force Agents working with me on this case the above described events.

9. I was told by Task Force Agents working with me on this case as follows: Surveillance Agents saw Salgado and the Latin male exit 5521 W. Warwick after I did at 2:50 P.M. Surveillance Agents followed both men, who drove off in separate vehicles. Agents then arrested both men. In the Latin males possession was the ppackage described in paragraph 5 above, containing nearly a kilogram of white powder.

10. After the arrest of the Latin male, he was advised of his constitutional rights and made the following statement to Task Force Agent Maurice Dailey:

a. This was the second time that he had done this for Salgado.

b. Salgado had just told him to take the kilogram to a particular apartment in Glenview, Ill. This was the apartment where the Latin male had obtained the kilogram of cocaine. Salgado said to go to that apartment and get five more kilograms and then meet with Salgado.

11. Agent Daley (sic) told me as follows:

a. the latin male agreed to take agent Daley (sic) to the Glenview apartment, which he did. The latin male indicated the apartment building, which was 2580 Gulf Road, Glenview, Illinois.

b. Agent Daley (sic) checked with the building manager at the address who said that Mr. Salgado lived in apartment 211.

c. Agent Daley (sic) went to apartment 211, knocked on the door, and received no response. Agent Daley (sic) was able to insert in the door a key that was seized from Salgado when he was arrested.

d. Agent Daley (sic) and other Task Force Agents are now securing the apartment from the hallway outside of it.

AUGUSTUS LETT, Task
Force Agent

James Balog, Magistrate
United States District Court
Northern District of Illinois

Dated: _____

RETURN

DATE WARRANT RECEIVED	DATE AND TIME WARRANT EXECUTED	COPY OF WARRANT AND RECEIPT FOR ITEMS LEFT WITH
May 31, 1985	May 31, 1985 - 8:30 pm	Apt. 211, 2580 Golf Rd., Glenview, Il.

INVENTORY MADE IN THE PRESENCE OF

Task Force Agent Knute Nyman

INVENTORY OF PROPERTY TAKEN PURSUANT TO THE WARRANT

1. White powder contained in one clear plastic bag wrapped in tan tape, further contained in a white plastic box wrapped in tan tape (gross weight) 1251 grams.

2. White powder contained in one white plastic box (gross weight) 349 grams.

3. White powder contained in 12 clear plastic bags further contained in tin foil paper and tape further contained in white plastic boxes wrapped in tan tape and further contained in brown cardboard box wrapped in tan tape and labeled with a shipping label to COLTOURS TRAVEL BUREAU, 2750½ West Devon, Chicago, Il. 60659. (gross weight) 16,800 grams.

4. One Ohaus triple beam scale - Serial #29374.

5. One blue suitcase containing one green ledger plus miscellaneous papers and narcotics paraphenalia (sic).

CERTIFICATION

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

_____

Subscribed, sworn to, and returned before me this date.

_____ _____

U.S. JUDGE OR MAGISTRATE DATE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 85 CR 357
vs.	)	Judge John A.
	)	Nordberg
JORGE SALGADO	)	

GOVERNMENT'S NOTICE TO DEFENDANT SALGADO
PURSUANT TO 21 U.S.C. § 851(a)(1)

The UNITED STATES OF AMERICA, by and through ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, hereby gives notice to defendant JORGE SALGADO of its intent to seek increased punishment for any of the charged offenses he is convicted of pursuant to 21 U.S.C. §§ 851(a)(1) and 841.

The enhanced penalty provisions of 21 U.S.C. § 841 are applicable because of defendant JORGE SALGADO'S September 9, 1983 Illinois conviction for possession of controlled substances with intent to deliver in the case of People v. Jorge E. Salgado, No.

83-156 before Judge Bailey of the Cook County Criminal Courts.

Because of the enhanced penalty provisions of 21 U.S.C. § 841 it is the government's position that the following maximum penalties apply to the Counts charged in the indictment:

Count 1 - 40 years imprisonment, $500,000 fine.

Count 2 - 30 years imprisonment, $250,000 fine, plus minimum special parole of six years up to maximum of life.

Count 3 - 40 years imprisonment, $500,000 fine.

Count 4 - 40 years imprisonment, $500,000 fine.

Count 5 - 4 years imprisonment, $30,000 fine.

Respectfully submitted,

ANTON R. VALUKAS
United States Attorney

BY: /s/ Ruben Castillo
RUBEN CASTILLO
Assistant United
States Attorney

/s/Robert B. Breisblatt
ROBERT B. BREISBLATT
Assistant United
States Attorney
219 South Dearborn Street
Room 1500
Chicago, Illinois 60604
353-5341 & 353-5489

RC:RBB:kf
10-15-85

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 85 CR 357
vs.	)	
	)	
JORGE SALGADO and	)	
HERNANDO BERNAL	)	

GOVERNMENT'S CONSOLIDATED ANSWER TO DEFENDANTS' PRETRIAL MOTIONS

The UNITED STATES OF AMERICA, by its attorney, ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, hereby responds as follows to the pretrial motions filed by defendants Jorge Salgado ("Salgado") and Hernando Bernal ("Bernal").

*****

RESPONSE TO MOTION TO SUPPRESS EVIDENCE FILED BY DEFENDANTS BERNAL AND SALGADO

A. Search of the Glenview Apartment

Both defendants Bernal and Salgado have filed motions to suppress various items and fingerprints recovered from a Glenview apartment. Both of these motions, however,

contain factual misstatements. The searches of apartment no. 211 located at 2580 W. Golf Road in Glenview were conducted pursuant to search warrants. The apartment was never searched without a search warrant. The government has attached hereto two different search warrants and affidavits that were used in this case. The first search warrant was obtained and executed on Friday, May 31, 1985 at an apartment no. 211 located at 2580 W. Golf Road, Glenview, Illinois, which had been leased by defendant Salgado. This search warrant resulted in the seizure of approximately 35 pounds of cocaine, a Ohaus triple beam scale, a Glory GFA 120 money counter, a blue suitcase containing a green ledger and various narcotics paraphenalia (sic).

Thereafter, on June 11, 1985 a second search warrant was obtained for the same apartment to conduct fingerprint analysis of

the apartment. Eight fingerprints of defendant Salgado were identified from the latent prints taken from the Glenview apartment.

The Seventh Circuit has recently held that a defendant bears the burden of proving the illegality of a search conducted pursuant to a warrant. United States v. Longmire, __ F.2d __, No. 84-1821 (May 3, 1985). There the Court stated (slip op. at 9):

> "If the search or seizure was effected pursuant to a warrant, the defendant bears the burden of proving its illegality. See 3 LA FAVE, SEARCH AND SEIZURE § ____, at 499 (2d ed. 1981). Where the police have acted pursuant to a warrant, the independent determination of probable cause by a magistrate gives rise to a presumption that the arrest or search was legal."

The defendants have failed to meet their burden. This Court's own review of the search warrant affidavits will conclude that the issuing magistrates had a substantial basis for concluding that a

search would uncover evidence of wrongdoing. See Illinois v. Gates, 462 U.S. 213, 236 (1983); Jones v. United States, 362 U.S. 257, 271 (1960). Thus, defendants' motions to suppress should be denied.

*****

Neither Bernal nor Salgado's motions to suppress warrant a hearing. Before a moving party will be entitled to a hearing, his motion must allege relevant factual issues with definiteness, clarity, and specificity, in terms that are neither general nor conclusory. Nechy v. United States, 665 F.2d 275, 776 (sic) (7th Cir. 1981); United States v. Hickok, 481 F.2d 377, 378-9 (9th Cir. 1973); United States v. Poe, 462 F.2d 195 (5th Cir. 1972), cert.denied, 414 U.S. 845 (1973). Since the defendants have failed to allege any specific facts

whatsoever, their motions to suppress must be denied without a hearing.

Respectfully submitted,

ANTON R. VALUKAS
United States Attorney

BY: /s/ Ruben Castillo
RUBEN CASTILLO
Assistant United
States Attorney

BY: /s/ Robert B. Breisblatt
ROBERT B. BREISBLATT
Assistant United
States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
353-5341 & 353-5489

RC:kf
8-15-85

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 85 CR 357
	)	
JORGE SALGADO AND HERNANDO BERNAL,	)	
	)	
	)	
Defendants.	)	

MOTION TO SUPPRESS EVIDENCE

NOW COMES the Movant, JORGE SALGADO, by and through his attorneys, DENNIS A. BERKSON & ASSOCIATES, LTD., and moves this Honorable Court to enter an order suppressing evidence seized from Movant, and in support thereof, states as follows:

1. That your Movant is the Defendant in the above matter.

2. That on May 31, 1985, Movant was arrested by DEA task force agents.

3. That the arrest was effectuated at or in the vicinity of 5521 W. Warwick, Chicago, Illinois.

4. That on May 31, 1985, subsequent to said arrest, the DEA task force agents entered and searched the premises located at 2580 W. Golf Road, Apt. 211, in Glenview, Illinois.

5. That pursuant to that search, certain evidence which the government seeks to introduce against your Movant was seized from that premises.

6. That your Movant is allegedly the lessee of that premises.

7. That neither your Movant, nor anyone with valid authority, gave valid consent to said search and seizure.

8. That said search was not made incident to the arrest.

9. That said search was not conducted pursuant to a lawful search warrant, issued by a neutral and detached magistrate.

10. That said search and seizure were conducted without probable cause and in violation of your Movant's Fourth Amendment

rights against unreasonable searches and seizure.

11. That there exist no exigent circumstances which would in any way justify the entry and search of said premises without a lawful search warrant.

12. That subsequent to said initial search, on June 11, 1985, a federal search warrant was issued authorizing the search of Apt. 211 of 2580 Gold Road, Glenview, Illinois.

13. That pursuant to the execution of said warrant, the government seized further evidence which it seeks to introduce against Movant, including, but not limited to, fingerprint samples.

14. That this evidence seized pursuant to the warrant was unlawfully seized and must be suppressed in that it constitutes fruit of the poisonous tree.

15. That the DEA task force agents who obtained and executed said search warrant blatantly failed and neglected to exercise good faith in the procurement and execution of said warrant.

16. That upon information and belief, the affidavit submitted in order to obtain the search warrant failed to show probable cause that the premises to be searched contained contraband, in light of the fact that all evidence had already been seized by the agents pursuant to this warrantless search.

WHEREFORE, your Movant, JORGE SALGADO, prays that this Honorable Court enter an order suppressing all evidence seized from the premises located at 2580 Golf Road, Glenview, Illinois.

Respectfully submitted,

/S/ Dennis A. Berkson
DENNIS A. BERKSON &
ASSOCIATES, LTD.
ONE NORTH LASALLE STREET
CHICAGO, ILLINOIS 60602
(312) 726-7402

ATTORNEYS FOR DEFENDANT
SALGADO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 85 CR 347
vs.	)	Violations: Title
	)	21, United States
JORGE SALGADO and	)	Code, Sections
HERNANDO BERNAL	)	841(a)(1), 846,
	)	and 843(b)

The APRIL 1985 GRAND JURY charges:

1. From at least May 24, 1985, to on or about May 31, 1985, in the Northern District of Illinois, Eastern Division and elsewhere,

JORGE SALGADO and
HERNANDO BERNAL,

defendants herein, wilfully and knowingly did combine, conspire, confederate and agree together and with other persons who are unknown to the Grand Jury to commit certain offenses against the United States, to wit:

(a) to knowingly and intentionally distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1);

(b) to knowingly and intentionally possess with intent to distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); and

(c) to knowingly and intentionally use a communication facility in committing the crime of distribution of a controlled substance, in violation of Title 21, United States Code, Section 843(b).

2. It was part of the conspiracy that defendant JORGE SALGADO would and did obtain cocaine for distribution.

3. It was further part of the conspiracy that defendant JORGE SALGADO leased apartment 211 of 2580 Gulf Road in Glenview, Illinois 60025 from UPX Corporation on May 24, 1985.

4. It was further part of the conspiracy that defendant JORGE SALGADO kept cocaine at apartment 211 at 2580 Gulf Road in Glenview, Illinois 60025.

5. It was further part of the conspiracy that defendant HERNANDO BERNAL would obtain cocaine from defendant JORGE SALGADO at

apartment 211 at 2580 Golf Road in Glenview, Illinois 60025 and defendant HERNANDO BERNAL would deliver said cocaine under defendant JORGE SALGADO's directions and orders.

6. It was further part of the conspiracy that defendant JORGE SALGADO possessed mobile phone equipment from which he conducted conversations regarding the sale of cocaine.

7. It was further part of the conspiracy that defendants JORGE SALGADO and HERNANDO BERNAL sold 50.6 grams of cocaine on May 31, 1985.

8. It was further part of the conspiracy that defendants JORGE SALGADO and HERNANDO BERNAL possessed with intent to distribute 1,348 grams of cocaine on May 31, 1985.

9. It was further part of the conspiracy that defendants JORGE SALGADO and HERNANDO BERNAL possessed with intent to distribute 18,390 grams of cocaine on May 31, 1985 at

apartment 211 at 2580 Golf Road in Glenview, Illinois 60025.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

The APRIL 1985 GRAND JURY further charges: On or about May 31, 1985, at Chicago, in the Northern District of Illinois, Eastern Division,

JORGE SALGADO and
HERNANDO BERNAL,

defendants herein, knowingly and intentionally did distribute 50.6 grams of a mixture containing cocaine, a Schedule II Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

The APRIL 1985 GRAND JURY further charges:

On or about May 31, 1985, at Chicago, in the Northern District of Illinois, Eastern Division,

JORGE SALGADO and
HERNANDO BERNAL,

defendants herein, did knowingly and intentionally possess with intent to distribute 1,348 grams of a mixture containing cocaine, a Schedule II Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FOUR

The APRIL 1985 GRAND JURY further charges:

On or about May 31, 1985, at Glenview, in the Northern District of Illinois, Eastern Division,

JORGE SALGADO and
HERNANDO BERNAL,

defendants herein, did knowingly and intentionally possess with intent to distribute 18,390 grams of a mixture containing cocaine, a Schedule II Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FIVE

The APRIL 1985 GRAND JURY further charges:

On or about May 31, 1985, at Chicago, in the Northern District of Illinois, Eastern Division,

JORGE SALGADO,

defendant herein, knowingly and intentionally did use a communication facility; to wit: a mobile telephone, in committing, causing and facilitating the conspiracy to possess with intent to distribute cocaine, a Schedule II Controlled Substance, a felony under Title 21, United States Code, Section 846, as more fully described in Count One of this indictment;

In violation of Title 21, United States Code, Section 843(b).

A TRUE BILL:

/s/James H. Ebbinghaus
FOREPERSON

/s/Anton R. Valukas
UNITED STATES ATTORNEY

RC/nw/wpc

RELEVANT JURY INSTRUCTIONS
(R. 437, 439-444, 446.)

THE COURT: ***** Now, the indictment is this case is the formal method of accusing the defendant of a crime and placing him on trial. It is not evidence against the defendant and does not create any inference of guilt.

The defendant is charged with the crimes of conspiracy to possess and distribute cocaine, distribution of cocaine, possession of cocaine with intent to distribute and the use of a communications facility, that is, a mobile telephone, to facilitate that conspiracy.

The defendant has denied that he is guilty of each charge.

*****

In Count 1 the defendant is charged with a violation of Title 21, United States Code, Section 846, which provides: "Any person who attempts or conspires to commit any offense defined in this subchapter," brackets,

"commits an offense against the United States."

Now, the term "any offense" defined in this subchapter includes possession of cocaine with intent to distribute it, distribution of cocaine and use of a communication facility to distribute cocaine.

You are instructed that cocaine is a Schedule II controlled substance.

In order to establish the offense of conspiracy that the government must prove these elements beyond a reasonable doubt: One, that the alleged conspiracy existed, and, two, that the defendant knowingly and intentionally became a member of the conspiracy.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose.

A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed you may consider the actions and statements of all of the alleged participants. The agreement may be inferred from all of the circumstances and the conduct of all of the alleged participants.

In determining whether the defendant became a member of the conspiracy you may consider only the acts and statements of that particular defendant.

To be a member of the conspiracy the defendant need not join at the beginning or know all of the other members or the means by which the purpose was to be accomplished. The government must prove beyond a reasonable doubt from the defendant's own acts and statements that he was aware of the common purpose and was a willing participant.

Now, to sustain the charge of conspiracy to possess and distribute cocaine as charged in Count 1 the government must prove the

following propositions: First, that a conspiracy existed to possess and distribute cocaine as described in Count 1, and, second, that the defendant, Jorge Salgado, knowingly and intentionally became a member of the conspiracy.

If you find from your consideration of all of the evidence that each of these propositions has been proved beyond a reasonable doubt then you should find the defendant guilty of Count 1.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt then you should find the defendant not guilty of Count 1.

In Counts 2, 3 and 4 the defendant is charged with a violation of Title 21, United States Code, Section 841(a)(1), which provides: "It shall be unlawful for any person knowingly or intentionally to

distribute or dispense or possess with intent to distribute or dispense a controlled substance."

The law recognizes two kinds of possession, actual and constructive possession.

A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole.

If two or more persons share actual or constructive possession of a thing possession is joint.

You may find that the element of possession, as that term is used in these instructions, is present if you find, beyond a reasonable doubt, that the defendant has actual or constructive possession, either alone or with others.

Now, to sustain the charge of distribution of 50.6 tenth grams of cocaine as charged in Count 2 the government must prove the following propositions: First, that the defendant distributed a quantity of a mixture containing cocaine and, second, that at the time the defendant distributed the cocaine he did so knowingly and intentionally.

If you find from your consideration of all of the evidence that each of these propositions has been proved beyond a

reasonable doubt then you should find the defendant guilty of Count 2.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt then you should find the defendant not guilty of Count 2.

To sustain the charge of possession of 1348 grams of cocaine with intent to distribute as charged in Count 3, the government must prove the following: First, that the defendant possessed a quantity of a mixture containing cocaine; second, that the defendant did so knowingly, and, third, that at the time the defendant possessed the cocaine he intended to distribute it.

Now, if you find from your consideration of all of the evidence that each of these propositions has been proved beyond a reasonable doubt then you should find the defendant guilty of Count 3.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt then you should find the defendant not guilty of Count 3.

Now, to sustain the charge of possession of 18,390 grams of cocaine with intent to distribute as charged in Count 4, the government must prove the following propositions: First, that the defendant possessed a quantity of a mixture containing cocaine, second, that the defendant did so knowingly and, third, that at the time that the defendant possessed the cocaine he intended to distribute it.

If you find from your consideration of all of the evidence that each of these propositions has been proved beyond a reasonable doubt then you should find the defendant guilty of Count 4.

If, on the other hand, you should find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt then you should find the defendant not guilty of Count 4.

To sustain the charge of the use of a communication facility to facilitate a conspiracy to possess cocaine with intent to distribute as charged in Count 5 the government must prove the following propositions: First, that the defendant used a mobile telephone as charged in Count 5; second, that such use of a mobile telephone was for the purpose of committing or facilitating a conspiracy to possess cocaine with intent to distribute which is described in Count 1 of the indictment, and, third, that the defendant's use of a mobile telephone to further the conspiracy was knowing or intentional -- my emphasis is wrong; that's

the last of that sentence. I will repeat the third again: and that the defendant's use of the mobile telephone to further the conspiracy was knowing or intentional.

If you find from your consideration of all of the evidence that each of these propositions has been proved beyond a reasonable doubt then you should find the defendant guilty of Count 5.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt then you should find the defendant not guilty of Count 5.

*****

Now, you will take these verdict forms into the jury room with you and when you have reached unanimous agreement on the verdict your foreperson should fill in and date the appropriate form as it may or may not be required and then each of you will sign it.

Now, each count of the indictment charged the defendant with having committed a separate offense. Each count and the evidence relating to it should be considered separately and a separate verdict should be returned as to each count.

Your verdict of "guilty" or "not guilty" of an offense charged in one count should not control your decision as to any other count.

RELEVANT EVIDENCE
Lett-Direct (2R. 98)

Q [Prosecutor] Let me show you what has been previously marked as Government Exhibit C-1 and ask you if you can identify that.

A Yes, sir.

Q What is it and how can you identify it?

A This is a plastic bag containing the purchased ounce of cocaine.

Bridges-Direct (2R. 212, 220-225)

Q And referring you to the red bag that is inside Group Exhibit 2-A, have you seen that before?

A Yes, sir, I have.

Q Where did you see it?

A I saw it after it was seized from Mr. Bernal.

Q And what was inside of the red bag?

A The box.

Q The white plastic box that is contained in Government Group Exhibit 2-C-A?

*****

Q Can you identify what has been marked as Group 3-C-A?

A Yes, sir, I can.

Q What is it?

A It is the white plastic box that I seized from that counter.

*****

Q What could you see inside the box?

A White powder.

*****

Q Did you recover anything from the kitchen cabinet?

A Yes.

Q What did you recover?

A It was a white plastic box.

*****

Q Okay. I am going to show you Group Exhibit 4-A; that is, Group Exhibit C Group Exhibit 4-A.

All right. Showing you C Group 4-A, can you identify that box?

A Yes, sir, I can.

Q What box is that?

A That is the white box that I recovered from the shelf.

*****

Q Did you recover anything in that bathroom closet?

A Yes.

Q What did you recover?

A A brown cardboard box containing 12 other plastic boxes identical to the one taken from the kitchen counter and identical to the one taken from Mr. Bernal.

Q Could you stand up and place an x where you recovered that brown box containing the 12 white plastic boxes and show that to the ladies and gentlemen of the jury.

A From the floor of this closet (indicating).

*****

Q Okay. I am going to show you what has been marked as C Group Exhibit 5-A.

*****

Q Can you identify those 12 boxes?

A Yes, sir. These are the 12 boxes that I took from that closet.

Q What did you do with those 12 boxes? Did you open them at all?

A I randomly opened about three of them, or four.

Q And what did you find in the boxes that you randomly opened?

A White powder.

*****

Q Were all of the 12 boxes full, to the best of your knowledge, from your handling of the 12 boxes?

A Yes. They were all of similar weight and the ones that I opened were full.

CHEMICAL TESTIMONY BY STIPULATION
(2R. 255-258)

THE COURT: At this time, then, I believe, the government has a stipulation, which is an agreement between the parties as to certain facts which shall be evidence in the case which shall be accepted by you as true.

Mr. Breisblatt.

MR. BREISBLATT: If called to testify, Terry A. Dalcason, a forensic chemist for the Department of Justice, Drug Enforcement Administration, would testify as follows: That he conducted examinations on certain exhibits that he received from agents of the Drug Enforcement -- Drug Enforcement Task Force agents and that, first, on Government's Exhibit C-1, he received Government's Exhibit C-1 and performed scientific tests upon it.

He determined that Government's Exhibit C-1 contained 28.1 grams of a white powder, of which 93 percent was cocaine.

He would further testify that he received Government's Exhibit C-2, removed the cocaine from the plastic box, sent the plastic box to the Federal Bureau of Investigation for fingerprint identification and analysis and conducted a scientific examination on the white powder therein.

He determined that the white powder in the box weighed 971 grams and was 93 percent cocaine.

THE COURT: Could we have a short side bar on this before you proceed, counsel?

MR. BREISBLATT: Yes, Judge. We don't need the court reporter on this.

(Side bar without court reporter.)

THE COURT: All right.

MR. BREISBLATT: For the record, I have been giving the jury the net weight of the substance. The gross weight of Government Exhibit 1 was 50.6 grams; the gross weight of

Government Exhibit 15 -- I am sorry, Government Exhibit C-2, was 1,350 kilograms --

THE COURT: And the reason for the difference between the gross and the net is that --

(Mr. Castillo and Mr. Breisblatt conferred.)

MR. BREISBLATT: Oh, yes. All right.

That was 1.350 kilograms or 1,350 grams. I am sorry.

THE COURT: Because that included the packaging material, and so on?

MR. BREISBLATT: Correct. That includes the packaging material.

THE COURT: And now you are on C-3?

MR. BREISBLATT: Now I am on C-3.

That he received Government Exhibit C-3 from agents of the Drug Enforcement Administration and it had a gross weight of approximately 1,253 grams; the substance was 96 percent cocaine and that he sent the

packaging it came in to the FBI lab for fingerprint analysis.

THE COURT: All right. Do you have the net weight now for that C-3?

MR. BREISBLATT: Yes. The net weight on that was 913 grams.

THE COURT: Okay. Thank you.

MR. BREISBLATT: The chemist would further testify that he received Government's Group Exhibit 5 in the original packaging, which is Government Exhibit C-5-A, I believe, from Drug Enforcement Administration agents.

The gross weight of the cocaine plus the plastic bags it was put in was 16,800 grams; the net weight was 12,067 grams and it was 93 percent cocaine.

Finally, he would testify that he received Government Exhibit C-4 from the agents and Government Exhibit C-4, the gross weight was approximately 349 grams and the net

weight wsa (sic) 40 grams and it was 92 percent cocaine.

He would further state that he sent all of the packaging material of Government Exhibit C-5-A to the Federal Bureau of Investigation for fingerprint identification and analysis.

That's the end of the stipulation between the government and the defense, your Honor.

THE COURT: All right. Again, this has been agreed to between the parties and so shall be in evidence and shall be accepted by you as true.

ADDITIONAL NOTICE OF ENHANCEMENT
(R. 465, 466.)

THE COURT: I do also want to mention because I am not sure that we have it on the record previously that the government served a notice prior to the time of trial, the Government's Notice to Defendant Salgado Pursuant to 21 U.S.C. 851(a)(1) as to the government's intention to seek increased punishment for any of the charged offenses he is convicted of pursuant to 21 U.S.C. 851(a)(1) and 841, and that is a two page document dated October 15, 1985, signed by both -- or counsel on behalf of the U.S. Attorney's Office previously served in the case.

I take it that the government persists in that, is that correct?

MR. CASTILLO: That is correct, your Honor.

THE COURT: All right.

U.S. Department of Justice NOTICE OF ACTION
United States Parole Commission
Chevy Chase, MD 20815

NAME: SALGADO, Jorge

INSTITUTION:
REGISTER NUMBER: 91840-024 Milan

In the case of the above-named the following parole action was ordered:

Continue to expiration.

(REASONS/CONDITIONS)

Your offense behavior has been rated as category EIGHT severity because it involved possession with intent to distribute cocaine, the equivalent of 15 kilograms or more at 100% purity. Your salient factor score is 6. You have been in custody a total of 17 months. Guidelines established by the Commission which consider the above factors indicate a range of 120+ months to be served before release for cases with good institutional adjustment and program achievement. After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted.

As required by law, you have also been scheduled for a statutory interim hearing December, 1991 (during the docket immediately preceding completion of the minimum term).

SALIENT FACTOR SCORE (SFS-81): Your individual salient factor score items have been computed as shown below. For an explanation of the salient factor score items, see reverse side of this form.

ITEM A = 2; B = 1; C = 2( )*; D = 0;
E = 0; F = 1 TOTAL SCORE = 6
*If five or more prior commitments, place an 'x' in the parenthesis in Item C.

Appeals procedure: You may appeal a decision to the National Appeals Board under 28 CFR 2.26.

December 1, 1986 (DATE)

North Central (REGION)

CAROL PAVILACK GETTY (COMMISSIONER)

ran (CLERK)

Supreme Court, U.S.
FILED
MAY 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1386

In the Supreme Court of the United States

OCTOBER TERM, 1986

JORGE SALGADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether evidence seized pursuant to a search warrant, but earlier seen in a warrantless search, should be suppressed.

2. Whether the district court imposed an appropriate sentence on petitioner.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A6-A32) is reported at 807 F.2d 603.

JURISDICTION

The judgment of the court of appeals (Pet. App. A4-A5) was entered on December 5, 1986. On January 30, 1987, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 5, 1987, and the petition was filed on February 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring, in violation of 21 U.S.C. 846, to distribute cocaine and to possess cocaine

with intent to distribute it (Count 1); one count of distributing 50.6 grams of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 2); two counts of possessing in excess of one kilogram of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 3 and 4); and one count of using a mobile telephone to facilitate the conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 843(b) (Count 5). He was sentenced to a total of 20 years' imprisonment and $500,000 in fines and was ordered to serve a lifetime special parole term following his release from confinement.

1. The evidence at trial established that on May 30, 1985, DEA Task Force Officer Augustus Lett learned from a confidential informant that petitioner wished to sell cocaine. The following day Officer Lett, accompanied by a surveillance team, met petitioner at the informant's Chicago home. Petitioner arrived at the house carrying two black bags, one of which contained a portable telephone. Petitioner explained to Lett that he did not physically carry his cocaine with him, but instead used his telephone to contact "a guy carrying it for me. He is circling the neighborhood, and if everything's okay he is going to bring the stuff in." Tr. 85-87, 90-91, 117, 167-169, 176-177.

Petitioner's telephone then rang. He listened, said "okay," and asked Officer Lett to show him the money he had brought to purchase the cocaine. Petitioner and Lett then left the residence and walked one block to where Clarence Travis, another undercover agent, was parked. At approximately the same time, petitioner's confederate, Hernando Bernal, entered the house carrying a red-orange bag. Tr. 91, 168-169, 172-173.

Officer Lett introduced petitioner to Travis, who displayed a large roll of cash. After petitioner counted the money, he instructed Travis to park in front of the informant's house, and he told Lett to return with him "and

check the stuff." Petitioner added: "If the stuff is alright, you take [it] and I will come out and get the money from your guy." On his return to the residence, Lett met Bernal, who placed a box on top of the red-orange bag. Petitioner opened the box, slit a foil wrapping to expose a compressed brick of white powder, assured Lett that "[t]his is the finest you can get," and invited him to "test it any way you want." Lett then purchased one ounce of the powder, ostensibly for the purpose of testing, and paid petitioner $1500. Tr. 91-94.

Lett assured petitioner that he would telephone petitioner after testing the powder. Petitioner's phone then rang, and he spoke to the caller in Spanish. After finishing the conversation, he said to Lett, "You see, I am a busy man. That was an order for five kilos." Petitioner then directed Bernal to take the box filled with powder and meet him with five kilograms of cocaine. Lett then left the residence and, contacting the surveillance agents by radio, told them he had just paid petitioner $1500 for one ounce of powder and that Bernal had a large brick of the same powder. Lett thereafter conducted a field test on the powder and found it to contain cocaine. Tr. 95-97.

After petitioner and Bernal left the informant's residence and separated, surveillance agents followed each of them. Petitioner was arrested 30 minutes later. During a search incident to his arrest, agents found $1300 of the $1500 Lett had paid him, together with several keys and a receipt from a locksmith. The receipt indicated that a new lock had been installed several days earlier at 2580 West Golf Road, in a Chicago suburb called Glenview, and that the work had been performed for petitioner. One of the surveillance agents, Agent Nyman, then took the keys and proceeded to the address on the receipt. Tr. 174, 183, 187, 189, 195-196, 291-292.

Bernal also was arrested after leaving the informant's residence. Incident to his arrest, the agents seized the red-

orange bag and the package of cocaine he had displayed for Officer Lett. Asked about the source of the cocaine, Bernal directed the arresting officers to 2600 West Golf Road in Glenview, the building immediately adjacent to 2580 West Golf Road. After Agent Nyman arrived, all the agents met and spoke to a janitor who served both buildings. The janitor informed the agents that petitioner recently had moved to Apartment 211 in the 2580 building. Officer Thomas Bridges then took the keys Nyman had seized from petitioner, entered Apartment 211, and conducted a cursory search. The apartment was unfurnished, and no one was in it. Bridges saw a white plastic box in the kitchen, a suitcase and a balance beam scale on the bedroom floor, and a money-counting machine in the living room. He did not touch anything in the apartment, and he opened no closets or other closed areas. Following his search, Bridges secured the apartment while awaiting a search warrant. Tr. 212-215, 219, 226, 229-230, 236-242, 245-246.

Four hours later, another group of agents arrived with a search warrant and conducted a thorough search of petitioner's apartment. They seized all the items Officer Bridges had seen earlier, plus more than 13 kilograms of cocaine. The warrant was based on an affidavit prepared by Officer Lett describing the circumstances in which petitioner and Bernal had been arrested and establishing that the apartment to be searched was indeed petitioner's and was probably the place from which Bernal had obtained the cocaine that he was carrying. Lett's affidavit, however, did not refer to anything that Officer Bridges had seen during his earlier warrantless search, and the warrant itself made no specific reference to anything seen by Bridges. Tr. 216-219, 221, 223-229, 225-257; Pet. App. A13-A14.

2. Before trial, petitioner moved to suppress the evidence seized from Apartment 211. The district court denied the motion (Pet. App. A38), and the court of appeals affirmed.

Petitioner argued that Officer Bridges' warrantless search was unlawful and that it tainted the subsequent, warrant-authorized search. He also argued that all the evidence that Bridges saw during this search had been "seized" by his having seen it. Because the evidence had already been unlawfully "seized," petitioner argued, the authorities were not free to seize the evidence once again under authority of a search warrant. The court of appeals rejected both arguments.

First, the court rejected petitioner's claim that Bridges' warrantless search tainted the agents' subsequent, warrant-authorized search. Without deciding whether Bridges' warrantless search was in fact unlawful, the court of appeals concluded that it was "reasonably plain that the search warrant would have been applied for, issued, and executed even if Bridges had never conducted the allegedly unlawful search" (Pet. App. A16). As there was "abundant[] * * * probable cause for obtaining a warrant" independent of anything Officer Bridges observed during his warrantless search, the court of appeals concluded that "the warrant would have been obtained and executed even if Bridges had never made his search" (*id.* at A17). Relying on this Court's decision in *Segura* v. *United States,* 468 U.S. 796 (1984), the court found that the subsequent, warrant-authorized search therefore was not tainted by Officer Bridges' earlier search, even assuming that the earlier search was unlawful (Pet. App. A17).

The court of appeals did not address petitioner's assertion that Officer Bridges, by viewing certain of the evidence inside petitioner's apartment during his warrantless search, unlawfully "seized" that evidence. Instead, the court ruled that "whether there is an interim illegal seizure of evidence is irrelevant to the issue of exclusion, provided there is (as there is here) very great confidence that the evidence would have been obtained for use at trial even if there had not been that seizure" (Pet. App.

A25-A26). In reliance on *Nix* v. *Williams,* 467 U.S. 431, 444-448 (1984), and *United States* v. *Silvestri,* 787 F.2d 736 (1st Cir. 1986), petition for cert. pending, No. 86-678, the court of appeals concluded "that the exclusionary rule does not require the exclusion of evidence that would have been obtained lawfully, just in order to punish a search that did not harm the defendant in any sense relevant to a criminal proceeding * * *. Since the evidence would have been obtained anyway, the alleged violation of [petitioner's] rights was not a cause, in the legal sense, of his conviction." Pet. App. A20.[1] Accordingly, the court found it unnecessary to decide "whether the [warrantless] search Bridges conducted was lawful" (*id.* at A28).

ARUGMENT

1. a. Petitioner asserts (Pet. 21-37) that the court of appeals improperly applied the inevitable discovery doctrine or the independent source doctrine to the facts of this case. On March 9, 1987, after the petition in this case was filed, the Court granted certiorari in *Murray* v. *United States,* No. 86-995. In that case, the Court will decide whether and in what circumstances the inevitable discovery doctrine or the independent source doctrine permits the use of evidence seen during a warrantless search

[1] In so holding, the court of appeals carefully distinguished this case, in which the government secured a valid search warrant, from cases in which the government had no intention of obtaining such a warrant but claims "it would have gotten a warrant if it had asked for one" (Pet. App. A27). To allow the admission of evidence under an exception to the exclusionary rule in the latter case, the court observed, "would defeat the purpose of requiring a warrant * * * [and] would be like saying that lynching a man is okay provided you have a well-grounded belief that if tried he would have been convicted and sentenced to death and the sentence carried out" (*ibid.*).

but later seized pursuant to an untainted search warrant that would inevitably have been obtained. We intend to argue in *Murray* that the principles of *Nix* v. *Williams*, 467 U.S. 431 (1984), allow the use of such evidence whenever the finder of fact determines, by a preponderance of the evidence, that the lawful, warrant-authorized search would inevitably have occurred. The decision below is consistent with that view, and, if we prevail in *Murray*, the present petition should be denied. If, however, the Court reverses in *Murray*, the Court may wish to remand this case for further consideration in light of the Court's analysis in *Murray*.

b. In addition to arguing that the evidence should not have been admitted under the independent source doctrine or the inevitable discovery doctrine, petitioner raises a fact-bound claim that the warrant in this case was based on false statements and illegally obtained evidence and that, but for the tainted matter, it did not establish probable cause. That claim does not warrant review and is without merit.

Petitioner "submits" (Pet. 25) that the agents must have relied on Bridges' warrantless search for the probable cause necessary to secure the warrant that authorized the search of his apartment. In support, he points to the fact that Officer Lett's affidavit provided that he "ha[d] reason to believe that * * * [t]he following property is concealed: Cocaine, United States currency, books, papers, documents, weighing scales, and other packaging materials." Pet. App. A41; see Pet. 24. Petitioner argues that the information in Officer Lett's possession at the time he prepared the affidavit, exclusive of anything he might have learned from Officer Bridges, furnished no basis for believing petitioner's apartment contained the listed items. Thus, he reasons, Lett must have relied on information derived from Bridges' warrantless search in preparing his affidavit.

There is no merit to this claim. If Lett had relied on Bridges for his information, he would have known to specify a money-counting machine, a white plastic box, and a suitcase—items viewed by Bridges during his warrantless search—among the items believed to be in petitioner's apartment. Similarly, he would have had no reason to specify such items as currency, books, papers, documents, or packaging materials, as Bridges saw none of those things during his earlier search.

c. Petitioner also argues (Pet. 25-28) that Lett's affidavit contained a number of factual inaccuracies that, taken together, divested the authorities of probable cause for obtaining a search warrant. In fact, however, the only errors appearing in the affidavit concerned the address of petitioner's building (whether it was 2580 or 2600 West Golf Road) and the identity of the person who advised the agents that petitioner lived in Apartment 211 of the 2580 building (whether it was a janitor or a building manager). See Pet. App. A46. Those factual errors, when set to one side, hardly undercut the "abundant[] * * * probable cause for obtaining a warrant" (*id.* at A17) that existed in this case. See *Franks* v. *Delaware*, 438 U.S. 154, 164-165 (1978).

2. Petitioner also raises a number of challenges to the sentence imposed by the district court. He concedes (Pet. 18), however, that he failed to present any of these arguments to either the district court or the court of appeals.[2] Accordingly, he is foreclosed from raising them in

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[2] Petitioner asks this Court to determine whether counsel's failure to raise these issues below deprived him of the effective assistance of counsel in violation of the Sixth Amendment (Pet. 19-21). Whatever the merits of that fact-bound claim, it is plain that review by this Court in the first instance is not the appropriate means to adjudicate that claim.

this Court for the first time. *Berkemer* v. *McCarty,* 468 U.S. 420, 443 (1984); *United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States,* 355 U.S. 339, 362 n.16 (1958). Whatever the merits of petitioner's claims regarding his sentence, there is no reason for this Court to exercise its certiorari jurisdiction in order to review issues that were not presented to or decided by the courts below.

a. Petitioner's statutory and Eighth Amendment claims that his sentence is illegal (Pet. 37-42, 51-57, 60-62) may be presented to the district court "at any time" (Fed. R. Crim. P. 35(a)).[3] If any of these claims has merit, therefore, petitioner has a forum in which to present it without the necessity of intervention by this Court at this stage.

We note, in any case, that petitioner was subject, *without* enhancement under 21 U.S.C. 851(a)(1),[4] to a maximum total sentence of 79 years' imprisonment and $905,000 in fines: 20 years' imprisonment and $250,000 fines on each of Counts 1, 3, and 4 (see 21 U.S.C. (Supp. III) 841(b)(1)(A)(ii) and 21 U.S.C. 846); 15 years' im-

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[3] Petitioner's objection to the manner in which his lifetime special parole term was imposed (Pet. 58-60) may well not be one of the issues that may be presented "at any time" under Rule 35(a), but in any event it is frivolous. The district court imposed the lifetime special parole term in the presence of the defendant on December 17, 1985 (see Pet. App. A33-A34, A35). The order entered three days later did not, as petitioner claims, "amend[] an existing sentence by adding a mandatory parole term" (Pet. 58); rather, it clarified that the special parole term was previously imposed under Counts 2 and 3 (see Pet. App. A36).

[4] Although the prosecution in this case sought enhanced punishment under Section 851(a)(1) in view of petitioner's prior conviction for possessing controlled substances with intent to distribute them (see Pet. App. A50-A52), the district court made no reference to the enhancement provision in its judgment and commitment order (*id.* at A33-A34), and no such reference appears in the district court's docket sheet (*id.* at A35). Petitioner nevertheless claims (Pet. 51-56) that he was improperly given enhanced sentences under Section 851.

prisonment and a $125,000 fine on Count 2 (see 21 U.S.C. (Supp. III) 841(b)(1)(B)); and four years' imprisonment and a $30,000 fine on Count 5 (see 21 U.S.C. 843(c)).[5] In addition, petitioner's conviction on Count 2 required the imposition of a special parole term of at least three years (see 21 U.S.C. (Supp. III) 841(b)(1)(B)), and—as petitioner recognizes (Pet. 61 n.7)—every court to consider the question has concluded that a lifetime special parole term is authorized by the statute. See *United States* v. *Bridges*, 760 F.2d 151, 153 (7th Cir. 1985) (collecting cases).[6] Petitioner's total sentence of 20 years' imprisonment, $500,000 in fines, and a lifetime special parole term thus falls well within the maximum to which he was subject.

b. Petitioner also claims (Pet. 43-46) that the district court's decision to impose sentence under both Counts 2 and 3 conflicts with *United States* v. *Palafox*, 764 F.2d 558 (9th Cir. 1985) (en banc). There is no merit to this claim.

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[5] Petitioner apparently claims (Pet. 38-42) that the maximum allowable sentence on each of Counts 1, 3, and 4 was only 15 years' imprisonment and a $125,000 fine under 21 U.S.C. (Supp. III) 841(b)(1)(B), rather than 20 years' imprisonment and a $250,000 fine under 21 U.S.C. (Supp. III) 841(b)(1)(A)(ii), because the trial court's instructions would have permitted the jury to convict on those counts without finding that they involved a kilogram or more of cocaine. We disagree with petitioner's contention (for which he cites no support) that the involvement of a kilogram or more of a cocaine is a jury matter. In any event, the jury was instructed as to the amounts of cocaine involved in Counts 3 and 4 (see Pet. App. A76-A77), on which the conspiracy alleged in Count 1 was based. Moreover, even if petitioner were right and we were wrong, the maximum total allowable sentence for petitioner's offenses would still be 64 years' imprisonment and a total fine of $530,000—a sentence greater than petitioner received.

[6] Petitioner argues that, because a life sentence without parole for writing a $100 bad check has been held disproportionate to the offense in violation of the Eighth Amendment (*Solem* v. *Helm*, 463 U.S. 277 (1983)), a lifetime special parole term for the serious drug offenses involved in this case is unconstitutional (Pet. 60-62). That argument is frivolous.

In *Palafox,* the defendant planned to sell a single package of heroin to an undercover DEA agent. At a meeting of the two, the agent asked for a .12-gram sample of the heroin before purchasing the remainder. Almost immediately after the officer was furnished the sample, but before the transaction was completed, the defendant was arrested. He was charged with and convicted of distributing the .12-gram sample as well as possessing the remainder of the package with intent to distribute it, both in violation of 21 U.S.C. 841(a)(1). He was then sentenced to concurrent five-year prison terms (764 F.2d at 559). The court of appeals subsequently concluded that, although the defendant could be charged with and found guilty of both distributing heroin and possessing the remainder of the same package with intent to distribute it, he could not be convicted and sentenced under both counts. Instead, the court held that "where the defendant distributes a sample and retains the remainder for the purpose of making an immediate distribution to the same recipients at the same place and at the same time," the defendant may be punished only once (*id.* at 560).

Petitioner's claim that his sentence conflicts with *Palafox* does not warrant review. Had the issue been raised below, the court of appeals easily could have distinguished the facts of this case from those in *Palafox.* In this case, unlike that one, the undercover agent actually paid for his sample. In addition, petitioner and Officer Lett agreed that Lett would contact petitioner on a later occasion, after testing the sample petitioner had sold him, in the event he wished to purchase the remainder. The second, unconsummated transaction in this case accordingly was separated in both time and location from the initial, consummated sale. This case therefore is distinguishable on its facts from the narrow holding in *Palafox.* See

United States v. *Rodriguez-Ramirez,* 777 F.2d 454 (9th Cir. 1985) (distinguishing the court's own recently decided *Palafox* case on identical grounds).

Similarly, there is no merit to petitioner's assertion (Pet. 46-51), also raised for the first time in this Court, that Counts 3 and 4 of the indictment are multiplicitous. Those counts charged petitioner with separate possessions of cocaine with intent to distribute it. Petitioner claims that, by convicting and sentencing him under both counts, the district court placed him twice in jeopardy for the same offense. Count 3 charged petitioner with possessing, in Chicago, 1.3 kilograms of cocaine (see Pet. App. A67), and Count 4 charged him with possessing, at his Glenview apartment, 18.39 kilograms of cocaine (*id.* at A68). The cocaine seized in Chicago, moreover, was 93% pure, whereas much of the cocaine seized from his apartment in Glenview was 92% pure (Tr. 255-257). As different evidence as to location, quantity, and purity was necessary to establish petitioner's guilt under the two possession counts, each properly charged him with a separate offense. *United States* v. *Rich,* 795 F.2d 680, 682-683 (8th Cir. 1986); *United States* v. *Griffin,* 765 F.2d 677, 682-683 (7th Cir. 1985); *United States* v. *Blakeney,* 753 F.2d 152, 154-155 (D.C. Cir. 1985); *United States* v. *Privett,* 443 F.2d 528, 531 (9th Cir. 1971).[7]

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[7] *United States* v. *Woods,* 568 F.2d 509 (6th Cir.), cert. denied, 435 U.S. 972 (1978), on which petitioner relies (Pet. 46-47), is inapposite. In that case, unlike this one, the court of appeals vacated the defendant's three separate convictions for possessing cocaine with intent to distribute it because all three packages of cocaine at issue in the three counts were seized at the same time from a single location and were virtually identical in both weight and purity (568 F.2d at 510-511).

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Murray* v. *United States,* No. 86-995.

Respectfully submitted.

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MAY 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40327